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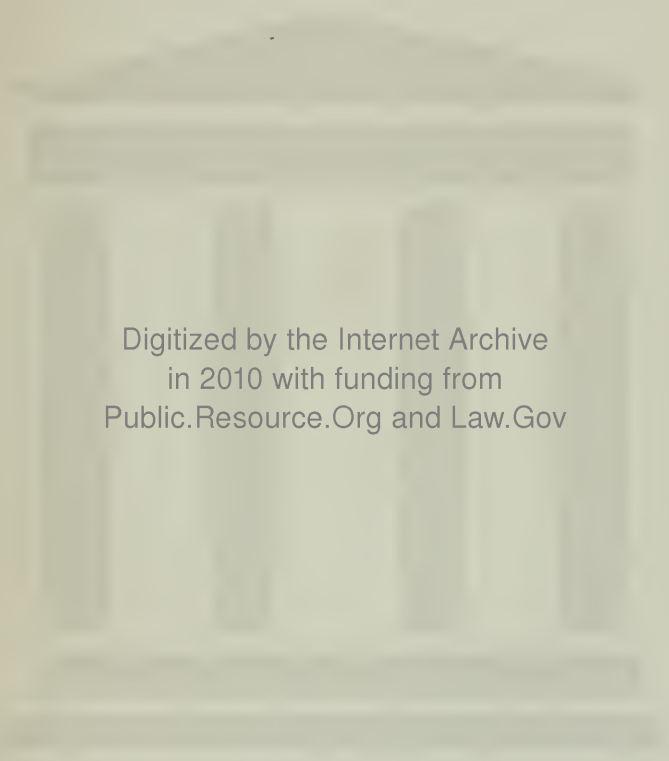
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No. 16130 ✓

Vol. 3092

United States
Court of Appeals
for the Ninth Circuit

METROPOLITAN LIFE INSURANCE COM-
PANY, a corporation, Appellant,

vs.

MARGARET L. GRANT, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

OCT 30 1958

PAUL P. O'BRIEN, CLERK

No. 16130

United States
Court of Appeals
for the Ninth Circuit

METROPOLITAN LIFE INSURANCE COM-
PANY, a corporation, Appellant,

vs.

MARGARET L. GRANT, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee.

In the District Court of the United States, North-
ern District of California, Southern Division

Civil No. 35022

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COM-
PANY, a New York corporation,
Defendant.

PETITION FOR REMOVAL OF CIVIL AC-
TION FROM THE SUPERIOR COURT OF
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SANTA CRUZ TO THE
DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DIS-
TRICT OF CALIFORNIA, SOUTHERN
DIVISION

To the Honorable Judges of said District Court
of the United States:

The Petition of Metropolitan Life Insurance
Company, a corporation, the Defendant above-
named, respectfully shows:

I.

That a Civil Action has been brought and is now
pending in the Superior Court of the State of Cali-
fornia in and for the County of Santa Cruz, a State
Court, wherein Margaret L. Grant is Plaintiff and
the Petitioner, Metropolitan Life Insurance Com-

pany, a corporation, is Defendant, which Action is designated by Number 28133 records of said Court and is hereinafter referred to as said Santa Cruz County Action Number 28133.

II.

That said Santa Cruz County Action Number 28133 is a Civil Action of which the District Courts of the United States have original jurisdiction because the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs and is between citizens of different States as more fully set forth hereinafter.

III.

That Defendant hereby petitions to remove said Santa Cruz County Action Number 28133 to this Court upon the ground and for the reason that said Action involves a controversy which is wholly between citizens of different States in that Margaret L. Grant, the Plaintiff, was at the time of the commencement of said suit a citizen and resident of the State of California and the Defendant, Metropolitan Life Insurance Company, a corporation, was at the time of the commencement of said suit and now is a corporation incorporated under the laws of the State of New York with its principal office in the City of New York, State of New York, and is a citizen and resident of said State of New York; that said Metropolitan Life Insurance Company was not, at the time of commencement of said suit nor is it now, a resident or citizen of the State of California.

IV.

That the Plaintiff in said Santa Cruz County Action Number 28133 is suing Petitioner herein, as Defendant, for the sum of Fifteen Thousand Dollars (\$15,000.00) plus interest.

V.

That said Santa Cruz County Action No. 28133 was commenced on or about October 7, 1955; that all process Pleadings and Orders served upon Petitioner in said Action are a copy of Summons and Complaint which was served on Defendant on October 10, 1955: that a true and correct copy of said Summons and Complaint is attached hereto marked "Exhibit A" and filed herewith.

VI.

That Petitioner herewith presents a good and sufficient bond in the sum of Two Hundred Fifty Dollars (\$250.00) conditioned that Petitioner, the Defendant, will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that said Action was not removable or was improperly removed.

Wherefore, Petitioner prays that the said Santa Cruz County Action Number 28133 be removed from said State Court into this Court for trial and determination; that this Court accept said bond and henceforth entertain exclusive jurisdiction over said Action.

/s/ BURTON L. WALSH,

/s/ RICHARD J. KILMARTIN,

KNIGHT, BOLAND & RIORDAN,

Attorneys for Petitioner, Metropolitan
Life Insurance Company

EXHIBIT "A"

In the Superior Court of the State of California,
in and for the County of Santa Cruz

No. 28133

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COM-
PANY, a New York corporation,
Defendant.

Action brought in the Superior Court of the State
of California, in and for the County of Santa
Cruz, and the Complaint filed in said County
of Santa Cruz, in the office of the Clerk of said
Superior Court.

The People of the State of California Send Greet-
ing to Metropolitan Life Insurance Company,
a New York corporation, Defendant:

You are Hereby Directed to Appear and Answer
the complaint in an action entitled as above, brought
against you in the Superior Court of the State of
California, in and for the County of Santa Cruz,
within ten days (exclusive of the day of service)
after the service on you of this Summons—if served
within this County, or within thirty days if served
elsewhere.

And you are hereby notified that unless you ap-
pear and answer as above required, the said plain-

Exhibit "A"—(Continued)

tiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and the seal of said court this 7th day of October, 1955.

[Seal] TOM M. KELLEY,
 Clerk

[Title of Superior Court and Cause No. 28133.]

COMPLAINT

Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On or about May 1, 1950, the defendant in consideration of the monthly payment by one Peter Grant to it, of \$15.05 made and delivered its policy of insurance in writing and thereby insured the life of said Peter Grant. Said policy of life insurance is numbered 20158526A and has heretofore been surrendered by the plaintiff to the defendant pursuant to the terms of said policy and is now in the possession of the defendant. The plaintiff is and was at all times herein concerned the beneficiary named in said policy. By said policy, the defendant undertook to pay to the beneficiary therein named upon the death of said Peter Grant the sum of Five

Exhibit "A"—(Continued)

Thousand Dollars (\$5,000.00) together with dividends as provided for in said policy, as well as an additional sum of Five Thousand Dollars (\$5,000.00) if said Peter Grant died as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent and accidental means.

III.

On August 13, 1954, while said policy was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being a resident of said County, as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent and accidental means, to-wit: as the sole result of the accidental inhalation and absorption of a poisonous substance. Said death occurred less than ninety (90) days after the date of such injuries and not as the result of travel or flight on any species of aircraft upon which said Peter Grant had any duties relating to such aircraft or flight.

IV.

Immediately upon the death of said Peter Grant, defendant became obligated to pay to plaintiff in said County of Santa Cruz, the county of plaintiff's residence, said additional sum of \$5,000.00 which was payable under the terms of the policy because of the death of said Peter Grant by accidental means.

V.

On or about October 21, 1954, the plaintiff fur-

Exhibit "A"—(Continued)

nished the defendant with proof of the death of said Peter Grant and made demand upon the defendant for payment of said additional sum of \$5,000.00.

VI.

Neither the whole nor any part of said additional sum of \$5,000.00 payable because of the death of said Peter Grant by accidental means has been paid.

VII.

Said Peter Grant and the plaintiff have each performed all the terms and conditions of said policy by each agreed to be performed.

As and for a Second, Separate and Distinct Cause of Action against the Defendant, Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first pre-

Exhibit "A"—(Continued)

mium payable on said contract. At said time and place defendant accepted said premium after having previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract.

III.

The plaintiff is and was at all times herein concerned the beneficiary named in said contract.

IV.

On August 13, 1954, while said contract was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being then a resident of said County and State, as the result of the accidental inhalation and absorption of a poisonous substance.

V.

Immediately upon the death of said Peter Grant, defendant became obligated to pay to plaintiff in said County of Santa Cruz, the county of plaintiff's residence, the sum of \$10,000.00, as provided for by the terms of said contract.

VI.

On or about October 21, 1954, the plaintiff furnished the defendant with proof of the death of said Peter Grant and made demand upon the defendant for payment of said sum of \$10,000.00.

VII.

Neither the whole nor any part of said sum of \$10,000.00 has been paid.

Exhibit "A"—(Continued)

VIII.

Said Peter Grant and the plaintiff have each performed all of the terms and conditions of said contract of life insurance by each agreed to be performed.

As and for a Third Separate and Distinct Cause of Action against the Defendant. Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first premium payable on said contract. At said time and place defendant accepted said premium.

III.

Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraph III, IV, V, VI, VII and VIII of her second cause of action.

Exhibit "A"—(Continued)

Wherefore, plaintiff prays for judgment against the defendant as follows:

Upon her First Cause of Action: in the sum of \$5,000.00 with interest thereon at the rate of 7% from August 13, 1954;

Upon her Second and Third Cause of Action: in the sum of \$10,000.00 with interest thereon at the rate of 7% from August 13, 1954;

For her costs of suit and for such further relief as the Court may deem just.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By H. F. BRAUER,
Attorneys for Plaintiff

Duly Verified.

Part A
Application to the METROPOLITAN LIFE INSURANCE COMPANY (Herein called "the Company")
(Ordinary Department)

TO BE COMPLETED IN THE CASE OF A WOMAN APPLICANT IF MARRIED

1. H. Husband's
name /₁₉₁₄

(b) His age..... (c) His occupation.....

(d) In what Companies?

(d) How much Life Insurance does he carry?

(f) In whose favor?

(g) Is application on his life now being submitted? If yes, give particulars.

(h) How many children have you now living?..... (i) State age and occupation of each.

The foregoing statements and answers are true and complete. It is agreed that: 1. The statements and answers in Part A and Part B of the application for this insurance shall

Exhibit "A"—(Continued)

Wherefore, plaintiff prays for judgment against the defendant as follows:

Upon her First Cause of Action: in the sum of \$5,000.00 with interest thereon at the rate of 7% from August 13, 1954;

Upon her Second and Third Cause of Action: in the sum of \$10,000.00 with interest thereon at the rate of 7% from August 13, 1954;

For her costs of suit and for such further relief as the Court may deem just.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By H. F. BRAUER,
Attorneys for Plaintiff

Duly Verified.

[Title of District Court and Cause.]

REMOVAL BOND

Know All Men by These Presents: That we, Metropolitan Life Insurance Company as principal, and the United States Fidelity and Guaranty Company, a corporation of the State of Maryland, having an office and usual place of business at 444 California Street, San Francisco, State of California, as Surety, are held and firmly bound unto Margaret L. Grant in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the United States of America, for which payment well and truly to be made, unto the said Margaret L. Grant, heirs, representatives, successors and assigns, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

The Condition of the Above Bond is as follows:

Whereas, the above bounden Metropolitan Life Insurance Company has filed a petition in the District Court of the United States for the Northern District of California, Southern Division, for removal to said Court of a certain Cause No. 28133, now pending in the Superior Court of Santa Cruz County, State of California, wherein Margaret L. Grant is plaintiff and said Metropolitan Life Insurance Company is defendant.

Now, if the said Metropolitan Life Insurance Company shall properly and legally enter into the

said District Court of the United States for the Northern District of California, Southern Division, within twenty (20) days after commencement of the action, or service of process, whichever is later, and shall comply with the provisions of Section 1446, Title 28, United States Code Annotated, as amended, and shall pay all costs that may be awarded if it shall be held that said suit was wrongfully or improperly removed, or that said suit was not properly removed, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals this 26th day of October, 1955.

[Seal] METROPOLITAN LIFE INSUR-
 ANCE COMPANY,
 /s/ By A. B. BROWN,
 Third Vice President

[Seal] UNITED STATES FIDELITY AND
 GUARANTY COMPANY,
 /s/ By CHRISTINE ROPER,
 Attorney-in-Fact

Notary's Certificates attached.

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

NOTICE OF PETITION FOR REMOVAL OF
CIVIL ACTION FROM THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA
CRUZ TO THE DISTRICT COURT OF
UNITED STATES FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

To Margaret L. Grant, Plaintiff, and Her Attor-
neys, Messrs. Wyckoff, Parker, Boyle & Pope:

You and each of you will please take notice that Metropolitan Life Insurance Company, a corporation, Defendant in the above Action has, on the 28th day of October, 1955, petitioned the above entitled Court for removal of the above entitled Civil Action now pending in the Superior Court of the State of California in and for the County of Santa Cruz, and bearing Number 28133 records of said Court, from said Court to the District Court of the United States for the Northern District of California, Southern Division.

You are further notified that on said 28th day of October, 1955, Metropolitan Life Insurance Company presented to and filed with the above entitled Court a good and sufficient bond in the sum of Two Hundred Fifty Dollars (\$250.00) conditioned that Petitioner, the Defendant, would pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that said Ac-

tion was not removable or was improperly removed.

Dated: October 28th, 1955.

/s/ BURTON L. WALSH,
/s/ RICHARD J. KILMARTIN,
KNIGHT, BOLAND & RIORDAN,
Attorneys for Petitioner Metropolitan
Life Insurance Company

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Defendant answers plaintiff's Complaint as follows:

As to the First Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations of paragraphs II, III, IV, V, VI and VII, except as herein otherwise admitted.

III.

On or about May 1, 1950, defendant Metropolitan Life Insurance Company made, issued and delivered to Peter Grant its Policy No. 20,158,526 A, insuring his life to the face amount of \$5,000.00 upon a Limited Payment Life Plan in consideration of the application therefor and the monthly premium of \$15.05. The policy provided for the payment of said \$5,000.00 of life insurance at the defendant's home office in the City of New York upon receipt of due proof of the death of the insured, and upon surrender of the policy.

IV.

Margaret L. Grant, wife, is the named beneficiary in said policy.

V.

On October 26, 1954, Metropolitan Life Insurance Company received the policy and due proof that the insured, Peter Grant, died on August 13, 1954, in Santa Cruz County, California, and forthwith paid to Margaret L. Grant, the plaintiff herein, the amount of life insurance, namely, \$5,000.00, plus dividends and interest in the amount of \$43.65, or a total of \$5,043.65. At the time of his death Peter Grant was a resident of Santa Cruz County, California.

VI.

The policy also contained a provision concerning death by accidental means as follows:

“Accidental Means Death Benefit—The Company promises to pay to the Beneficiary under this Policy, in addition to the amount otherwise payable

according to the terms of this Policy, an additional sum equal to the Amount of Insurance shown on page 1, upon receipt at the Home Office of due proof of the death of the Insured, while this provision is in effect, as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent, and accidental means, and that such death shall not have occurred (a) more than 90 days after the date of such injuries, or (b) as the result of or by the contribution of disease or bodily or mental infirmity or medical or surgical treatment therefor or infection of any nature unless such infection is incurred through an external visible wound sustained through violent and accidental means, or (c) as the result of self-destruction, whether sane or insane, or (d) as the result of travel or flight on any species of aircraft if the Insured has any duties relating to such aircraft or flight, or is flying in the course of any aviation training or instruction, or any training or maneuvers of any armed forces, or (e) as a result of participating in or attempting to commit an assault, or (f) as a result of an act of war."

VII.

Further consideration for the issuance of the policy was a written rider dated April 10, 1950, signed by the insured and attached to and made a part of the policy, which rider provides as follows:

"To the Metropolitan Life Insurance Company:

It is understood and agreed that the extra pre-

mium for aviation hazards included in the Life insurance premium applies to the Life insurance only. It does not apply to the Accidental Means Death Benefit which will not be paid if death occurs as the result of travel or flight on any species of aircraft if the insured has any duties relating to such aircraft or flight, or is flying in the course of any aviation training or instruction, or any training or maneuvers of any armed forces.”

VIII.

Plaintiff has demanded of defendant the additional sum of \$5,000.00, but defendant refused the demand, and has not paid any part thereof because the death of Peter Grant was not the result of accidental means as defined in the policy. Peter Grant's death occurred as the result of his duties of flying an aircraft which he crash landed while he was engaged in his occupation of crop duster. He died on August 13, 1954, within a few minutes after said crash landing.

IX.

There is nothing now due from defendant to Plaintiff. Defendant has fully discharged its obligation to plaintiff by the payment of said \$5,043.65.

As to the Second Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California,

and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained in paragraphs II, III, IV, V, VI, VII and VIII of the alleged Second Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954.

III.

There is nothing due from defendant to plaintiff.

As to the Third Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained in paragraphs II and III of said alleged Third Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954.

III.

There is nothing due from defendant to plaintiff.

Wherefore, defendant Metropolitan Life Insurance Company prays judgment in its favor and for its costs of suit.

/s/ BURTON L. WALSH,
KNIGHT, BOLAND & RIORDAN,
Attorneys for Defendant

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 2, 1955.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT

Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On or about May 1, 1950, the defendant in consideration of the monthly payment by one Peter Grant to it, of \$15.05 made and delivered its policy of insurance in writing and thereby insured the life of said Peter Grant. Said policy of life insurance is numbered 20158526A and has heretofore been surrendered by the plaintiff to the defendant pursuant to the terms of said policy and is now in the possession of the defendant. The plaintiff is and was at all times herein concerned the beneficiary named

in said policy. By said policy, the defendant undertook to pay to the beneficiary therein named upon the death of said Peter Grant the sum of Five Thousand Dollars (\$5,000.00) together with dividends as provided for in said policy, as well as an additional sum of Five Thousand Dollars (\$5,000.00) if said Peter Grant died as the result, directly and independently of all other cause, of bodily injuries caused solely by external, violent and accidental means.

III.

On August 13, 1954, while said policy was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being a resident of said County, as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent and accidental means, to wit: as the sole result of the accidental inhalation and absorption of a poisonous substance. Said death occurred less than ninety (90) days after the date of such injuries and not as the result of travel or flight on any species of aircraft upon which said Peter Grant had any duties relating to such aircraft or flight.

IV.

Immediately upon the death of said Peter Grant, defendant became obligated to pay to plaintiff in said County of Santa Cruz, the county of plaintiff's residence, said additional sum of \$5,000 which was payable under the terms of the policy because of the death of said Peter Grant by accidental means.

V.

On or about October 21, 1954, the plaintiff furnished the defendant with proof of the death of said Peter Grant and made demand upon the defendant for payment of said additional sum of \$5,000.

VI.

Neither the whole nor any part of said additional sum of \$5,000 payable because of the death of said Peter Grant by accidental means has been paid.

VII.

Said Peter Grant and the plaintiff have each performed all the terms and conditions of said policy by each agreed to be performed.

As and for a Second, Separate and Distinct Cause of Action against the Defendant, Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first pre-

mium payable on said contract. At said time and place defendant accepted said premium after having previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract.

III.

The plaintiff is and was at all times herein concerned the beneficiary named in said contract.

IV.

On August 13, 1954, while said contract was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being then a resident of said County and State, as the result of the accidental inhalation and absorption of a poisonous substance.

V.

Under said contract of life insurance, and upon the death of said Peter Grant, defendant became obligated to pay to plaintiff the following sums:

(a) the sum of \$100 on the date of death of Peter Grant, namely on August 13, 1954, and a like sum during each and every month thereafter for a total period of twenty years next succeeding said date of death.

(b) the sum of \$10,000 on the twentieth anniversary date of said date of death.

VI.

On or about October 21, 1954, plaintiff furnished defendant with proof of the death of said Peter

Grant and made demand upon the defendant for its performance and payment under said contract of insurance.

VII.

Neither the whole nor any part of the sums due under said contract of insurance has been paid.

VIII.

Said Peter Grant and the plaintiff have each performed all of the terms and conditions of said contract of life insurance by each agreed to be performed.

As and for a Third Separate and Distinct Cause of Action against the Defendant, Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first premium payable on said contract. At said time and place defendant accepted said premium.

III.

Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraphs III, IV, V, VI, VII and VIII of her second cause of action.

Wherefore, plaintiff prays for judgment against the defendant as follows:

Upon her First Cause of Action: in the sum of \$5,000.00 with interest thereon at the rate of 7% from August 13, 1954;

Upon her Second and Third Cause of Action: in the sum of \$100 per month from August 13, 1954 to August 13, 1974 plus the sum of \$10,000 on August 13, 1974, with interest at the rate of 7% per annum on each unpaid installment from the date it fell due to the date of payment.

For her costs of suit and for such further relief as the Court may deem just.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By HARRY F. BRAUER,
Attorneys for Plaintiff

[Exhibit A is set out at page 13 of this printed record.]

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 10, 1956.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Defendant answers plaintiff's First Amended Complaint as follows:

As to the First Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations of paragraphs II, III, IV, V, VI and VII, except as herein otherwise admitted.

III.

On or about May 1, 1950, defendant Metropolitan Life Insurance Company made, issued and delivered to Peter Grant its Policy No. 20 158 526 A, insuring his life to the face amount of \$5,000.00 upon a Limited Payment Life Plan in consideration of the application therefor and a written rider hereinafter more fully described and the monthly premium of \$15.05. The policy provided for the payment of said \$5,000.00 of life insurance at the defendant's home office in the City of New York

aviation training or instruction, or any training or maneuvers of any armed forces.”

VIII.

Plaintiff has demanded of defendant the additional sum of \$5,000.00, but defendant refused the demand, and has not paid any part thereof because the death of Peter Grant was not the result of accidental means as defined in the policy. Peter Grant's death occurred as the result of his duties of flying an aircraft which he crash landed while he was engaged in his occupation of crop duster. He died on August 13, 1954, within a few minutes after said crash landing.

IX.

There is nothing now due from defendant to plaintiff. Defendant has fully discharged its obligation to plaintiff by the payment of said \$5,-043.65.

As to the Second Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained

in paragraphs II, III, IV, V, VI, VII and VIII of the alleged Second Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954. Defendant never received a full first premium or any premium at all.

III.

There is nothing due from defendant to plaintiff.

As to the Third Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained in paragraphs II and III of said alleged Third Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954. Defendant never received a full first premium or any premium at all.

III.

There is nothing due from defendant to plaintiff.

Wherefore, defendant Metropolitan Life Insur-

gave his check in payment of the first premium, which Mr. Price accepted and receipted for.

At the time the application was accepted, the money paid and the receipt given, all that remained to be done was the medical examination. This was arranged for, but the day the examination was to be made Grant was killed—his death occurring in the course of his business as a crop duster, and from no other cause.

While Grant's wife was under a doctor's care, the agent, having learned of the death of Grant, and said agent still having the check in his possession, rushed to the home of the Plaintiff, left the check and tried to get her to sign a receipt, which she refused to do. It appears from the evidence that she was in no physical condition to transact any business whatever. I will not comment on this action by the agent except to ignore it as it is not material here.

The facts are simple, as outlined above. This application was accepted by the company as to the business of Grant after over two months of negotiations between the agent and Grant. The money was paid by Grant and there was no way for him to get it back unless the company refused the policy. This they had not done at the time of his death. It is fair to assume that had Grant not met with such untimely death, the defendant insurance company would have insisted that Grant's coverage dated from August 10, 1954, and debited him for his next monthly premium as due September 10, 1954.

I find very little difference in this case and the case of *Ransom vs. Penn. Mut. Life Insurance Company*, (Calif.) 274 P. 2d 633. I hold that the insurance was in force from the date of the payment of the premium.

There is no necessity of going into the rulings on the admissions of evidence which were taken under advisement by the Court at the time of the trial, as they are not material to the decision of this case.

Attorneys for Plaintiff may prepare Findings of Fact, Conclusions of Law, and Judgment, in accordance with the rules of this Court.

[Endorsed]: Filed January 31, 1958.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

* * * * *

1957

Mar. 18—Lodged findings and conclusions (by plttf.)

Mar. 18—Lodged judgment (by plttf.)

Mar. 24—Filed objections of deft. to proposed findings and conclusions by plttf.

* * * * *

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's First Cause of Action having been dismissed prior to trial upon motion of Plaintiff, the above entitled cause came on regularly for trial before the Court upon the allegations contained in the Second and Third causes of action of plaintiff's First Amended Complaint and the defendant's answer thereto, and the Court having duly considered the evidence and being fully advised in the premises, as to Plaintiff's second and third causes of action, finds the following:

Findings of Fact

I.

Plaintiff is a resident of the State of California; defendant is a resident of the State of New York; the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

II.

Plaintiff is the widow of Peter Grant and the beneficiary named in the contract of insurance sued upon in this action. Subsequent to the death of Peter Grant, plaintiff married one Gerald P. Kenny and her name now is Margaret L. Kenny. At the trial, plaintiff moved and the Court ordered that the complaint be amended to set forth plaintiff's present name.

III.

At all times herein mentioned prior to August 13, 1954, Peter Grant was a pilot engaged in the business of spraying crops and orchards with insecticide dust by means of an airplane.

IV.

At all times herein mentioned, George I. Price was an agent of the defendant authorized, among other things, to solicit applications for life insurance, to take such applications, to inform the applicant of the premium payable, to request and accept such premiums on behalf of the defendant and to give binder receipts therefor.

V.

Between June 1, 1954, and August 9, 1954, George Price on behalf of defendant solicited Peter Grant for life insurance. In the course of said period of time and in pursuit of said solicitation the defendant fully informed itself of Peter Grant's needs and desires for life insurance and of his occupation and other factors bearing upon his acceptability as an insurance risk and the terms upon which such risk would be assumed by defendant.

VI.

At all times herein mentioned up to and including August 13, 1954, Peter Grant enjoyed excellent health and suffered from no disability, infirmity or ailment.

VII.

On or before August 10, 1954, defendant, at its

head office, authorized and approved Peter Grant for insurance as to the business in which he was engaged.

VIII.

On August 10, 1954, in Watsonville, County of Santa Cruz, State of California, the following facts occurred: George Price solicited Peter Grant to execute, Peter Grant executed, signed and delivered to Price and Price accepted Part A of an application for life insurance (Plaintiff's Exhibit 1 in evidence). George Price computed, solicited from Peter Grant and received and accepted from the latter the sum of \$53.36. George Price executed and delivered to Peter Grant a receipt (plaintiff's Exhibit 2 in evidence). Each of said acts was done by George Price on behalf of and under authority from defendant. The sum of \$53.36 was a full first monthly premium for the contract of life insurance set forth in said application and receipt.

IX.

Plaintiff and Peter Grant and each of them at all times construed the application and the binder receipt as effecting a contract of insurance upon the life of Peter Grant in accordance with the terms set forth in said documents immediately upon signing Part A of said application and delivery of said sum of \$53.36. Said construction was reasonable.

X.

At no time prior to the death of Peter Grant did the defendant perform any act or communicate

an intention to rescind or terminate said contract of insurance.

XI.

In the early morning of August 13, 1954, Peter Grant died solely as the result of an accident while engaged in his occupation hereinbefore mentioned.

XII.

Said contract of insurance provided for the payment by defendant to plaintiff upon the death of Peter Grant of the following sums: (a) the sum of \$100.00 on the date of death of Peter Grant, namely, on August 13, 1954, and a like sum on the same day each and every month thereafter terminating with the monthly payment due immediately prior to the 20th anniversary of said date of death, (making a total of 240 monthly payments of \$100.00 each) and (b) the sum of \$10,000.00 on the twentieth anniversary date of said date of death.

XIII.

Plaintiff made written claim for insurance benefits in connection herewith, which claim was received by Defendant on October 26, 1954.

Conclusions of Law

From the foregoing facts the Court concludes:

I.

The Court has jurisdiction over the parties and the subject matter of this controversy.

II.

On August 10, 1954 a contract of insurance upon

the life of Peter Grant was entered into between Peter Grant and the defendant, said contract was dated August 11, 1954, and was to take effect on said date. The provision in said contract with regard to approval of the risk at the defendant's home office was a condition subsequent; i.e. Peter Grant was insured from the date of the contract subject to the right of the defendant during the life time of the insured to return the premium paid and to communicate its disapproval of the risk and thereby to terminate the contract.

III.

Said contract was in full force and effect on August 13, 1954, the date of Peter Grant's death.

IV.

Plaintiff and Peter Grant have each performed all the terms and conditions of said contract by each agreed to be performed.

V.

Under and by the terms of said contract, defendant is obligated to pay to plaintiff the following sums:

(a) the sum of \$100.00 on the date of death of Peter Grant, namely on August 13, 1954, and a like sum on the same day each and every month thereafter terminating with the monthly payment due immediately prior to the twentieth anniversary of said date of death, (making a total of 240 monthly payments of \$100.00 each), with interest upon the monthly installments due August 13, 1954, Septem-

ber 13, 1954, and October 14, 1954, at the rate of 7% per annum from October 26, 1954, until paid and with interest on all other unpaid monthly installments at the rate of 7% per annum from the date each such installment became due until paid, and

(b) the sum of \$10,000.00 on the twentieth anniversary date of said date of death, and plaintiff shall have judgment in said sums plus her costs of suit.

Let Judgment be entered accordingly.

Dated April 8, 1958.

/s/ CHASE A. CLARK,
U. S. District Judge

[Endorsed]: Filed April 11, 1958.

United States District Court, Northern District
of California, Southern Division

Civil No. 35,022

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COM-
PANY, a New York corporation,
Defendant.

JUDGMENT

The above entitled action came on for trial before the Court without a jury, on June 19, 1957 and

June 20, 1957, the plaintiff appearing in person and by her attorneys, Messrs. Wyckoff, Parker, Boyle & Pope, Philip T. Boyle and Harry F. Brauer of Counsel, and the defendant appearing by its attorneys, Knight, Boland & Riordan, Burton L. Walsh and J. J. Quigley of Counsel, and testimony having been heard and briefs filed by both parties, and the Court having filed its findings of fact, conclusions of law, and order for judgment, and its memorandum opinion herein, now, pursuant to said Order for Judgment, it is hereby

Ordered and Adjudged that the plaintiff Margaret L. Kenny (previously known as Margaret L. Grant) have judgment against the defendant in the following sums: the sum of one hundred dollars (\$100.00) on August 13, 1954, the further sum of one hundred dollars (\$100.00) on the 13th day of each month thereafter terminating with the monthly payment due immediately prior to the twentieth anniversary of said date of death, (making a total of 240 monthly payments of \$100.00 each) with interest upon the monthly installments due August 13, 1954, September 13, 1954, and October 14, 1954, at the rate of 7% per annum from October 26, 1954, until paid, and with interest on all other unpaid monthly installments at the rate of 7% per annum from the date each such installment became due until paid, and the further sum of ten thousand dollars (\$10,000.00) on the twentieth anniversary date of said date of August 13, 1954, and for her costs and disbursements in this action, to be hereafter taxed, on notice, and hereinafter inserted by

the Clerk of this Court in the sum of \$165.64.

Dated April 8, 1958.

/s/ CHASE A. CLARK,
U. S. District Judge

Entered in Civil Docket 4-11-58.

[Endorsed]: Filed April 11, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Metropolitan Life Insurance Company, a corporation, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 11th day of April, 1958.

Dated: May 9, 1958.

KNIGHT, BOLAND & RIORDAN,
/s/ BURTON L. WALSH,
Attorneys for Defendant Metropolitan Life Insurance Company

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL

Whereas, Metropolitan Life Insurance Company, a corporation, Defendant in the above entitled action has appealed to the United States Court of

Appeals for the Ninth Circuit from a judgment made and entered on the 11th day of June, 1958 against said Defendant in said action, in the said District Court, in favor of the Plaintiff in said action, Margaret L. Kenny, previously known as Margaret L. Grant.

Whereas, the appellant is desirous of staying the execution of the said judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned Metropolitan Life Insurance Company, a New York Corporation, as Principal, and the National Surety Corporation, a Corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, as Surety, do hereby acknowledge themselves justly bound in the sum of Ten Thousand and No/100 Dollars (\$10,000.00) jointly and severally, firmly by these presents, to the effect that if for any reason the appeal is dismissed or if the judgment is affirmed, the appellant will pay said judgment in full together with costs, interest and damages for delay, and will pay in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award to the Plaintiff Margaret L. Kenny, her heirs, successors, administrators, successors or assigns.

In Witness Whereof, the corporate name, seal and signature of said Principal is hereto affixed and the corporate name, seal and signature of the said Surety is hereby affixed by its duly authorized

Attorney in Fact at San Francisco, California, this
9th day of May, 1958.

[Seal] METROPOLITAN LIFE INSUR-
ANCE COMPANY,

/s/ By L. J. SCHMOLL,
Third Vice President

[Seal] NATIONAL SURETY CORPORA-
TION,

/s/ By A. C. JOHNSON,
Attorney in Fact

This bond approved this 9th day of May, 1958
and ordered that the same, when filed, shall operate
as a supersedeas for the judgment made and en-
tered in the above cause.

/s/ LOUIS E. GOODMAN,
District Judge

Notary Certificates attached.

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
DOCKETING APPEAL

Good cause appearing therefor,

It is ordered the time for docketing the appeal
herein is extended to and including August 7, 1958.

Dated: June 10th, 1958.

/s/ LOUIS E. GOODMAN,
Chief Judge U. S. District Court

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Petition for Removal from the Superior Court of Santa Cruz County, with copy of Complaint and Summons attached.

Bond on Removal.

Notice by Defendant of Petition for Removal.

Answer of Defendant.

Motion of Plaintiff for Production and Inspection of Records.

Order for Production and Inspection of Records.

Notice by Plaintiff of Motion to File First Amended Complaint.

Order Granting Leave to File First Amended Complaint.

First Amended Complaint.

Answer to First Amended Complaint.

Order of Dismissal of First Cause of Action.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law (lodged by Plaintiff).

Judgment (lodged by Plaintiff).

Objections of Defendant to Findings, Conclusions
and Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Supersedeas Bond.

Appellant's Designation of Record on Appeal.

Order Extending Time to Docket Record on Ap-
peal.

Reporter's Transcript of Trial Proceedings June
19 and 20, 1957.

Plaintiff's Exhibits: 1, 2, 3, 4, 5 and 6.

Defendant's Exhibits: A, B, C, D, E, F, G and H.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court
this 7th day of August, 1958.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By MARGARET P. BLAIR,

Deputy Clerk

The United States District Court, Northern District
of California, Southern Division

No. 35,022

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS

June 19, 1957

Before: Hon. Chase A. Clark, Judge.

Appearances: For the Plaintiff: Messrs. Wyckoff, Parker, Boyle & Pope, by Philip Boyle, Esq., and Harry F. Brauer, Esq. For the Defendant: Messrs. Knight, Boland & Riordan, by Burton L. Walsh, Esq., and J. J. Quigley. [1*]

The Clerk: Margaret L. Grant vs. Metropolitan Life Insurance Company, for trial.

Mr. Boyle: Ready for the plaintiff.

The Court: You may make your opening statement.

Mr. Brauer: Your Honor, I should like to file and serve a trial brief at this time.

May it please the Court, the issue in this case is whether insurance on the life of Peter Grant was

* Page numbers appearing at top of page of Reporter's Transcript of Record.

in effect on August 13, 1954, when Peter Grant died in an accident.

We intend to show that one George Price was an agent of the defendant Metropolitan Life Insurance Company, authorized among other things to solicit insurance for Peter Grant, to take an application for such life insurance, to inform Peter Grant of the premium to be paid, to solicit and to accept such a premium, and to give a binder receipt therefor.

Now, we intend to show further, your Honor, that Peter Grant was a rather unusual risk for the defendant to take. He was an unusual risk for only one specific reason, namely, because of his occupation. He was a crop dusting pilot.

We intend to show that prior to the time that the application was taken the defendant, Metropolitan Life Insurance Company, had categorically determined that it will accept this aviation risk.

We will show further that on August 10, 1954, after numerous conferences with Mr. and Mrs. Grant, and after [3] numerous consultations with the defendant's home office, George Price took an application for life insurance from Peter Grant. At that time he advised Peter Grant that the first full monthly premium would be \$53.36; that he solicited that amount from Peter Grant, and that Peter Grant paid him a check in that amount, and that Mr. Price at that time gave to Peter Grant a binder receipt therefor.

We intend to show that under existing law a contract of insurance on the life of Peter Grant arose

immediately upon the taking of the signing of that application and the payment of that premium, subject to the right of the defendant Metropolitan Life Insurance Company to terminate that contract if and when it subsequently became persuaded that it would not approve that risk.

We will show that by the time the obligations of the parties became fixed by the death of Peter Grant on August 13, 1954, the defendant Metropolitan Life Insurance Company had not determined that it would not accept the risk and had not notified the plaintiff that it rejected the risk.

Lastly, Your Honor, we contend that under existing law, specifically the Ransom case which we discussed in some detail in the brief we just filed, the medical insurability of the applicant at the time of the application is not a condition precedent to coverage—to insurance coverage.

Nevertheless, however, just to protect us in the event [4] the Court may construe the cases on that point differently from the way we do, we intend to show that Peter Grant at the time the application was taken and at all times from then to the time of his death, was in fact in sound health and was a standard insurable risk.

Thank you, Your Honor.

Mr. Walsh: If Your Honor please, the complaint against the Metropolitan Life Insurance Company is based on three causes of action, the first of which the plaintiff has voluntarily dismissed.

That leaves remaining the two causes of action

whereby the plaintiff claims that although there was an uncompleted application for insurance, nevertheless the Company is bound to pay some \$34,000.00 over a period of time.

The complaint sets forth a part of the application, only a small part of it, and it also attaches to it a photostatic copy of a receipt that was given by the soliciting agent at the time payment was made on account of the premium.

The plaintiff's cause of action is predicated upon a written contract as attached to the complaint.

The fact of the matter is that there is no case in California holding that you can have a contract of insurance until the application is at least fully completed, the medical examination had, the full first premium received by the company at its home office, together with the completed application. [5]

Now, in this case the evidence will show that part A, which is one of several parts of the application, was partially completed, signed by the applicant. It was an application for what is called a whole life family income policy, meaning, briefly, that for a period of 20 years, or during a period of 20 years, there is a decreasing term, so that if the insured should die during the first 20 years, there would be a payment of so much per month per thousand of insurance to the beneficiary. At the end of the 20-year term, there would be a lump sum payment.

Now, it is quite plain from even the portion of the application that the plaintiff has attached to her complaint, and from the receipt, that there are

certain conditions precedent that must be complied with by the applicant before the Company can even consider the application. And one of the most important ones is, of course, that he submit himself to the Company's examining physician for a medical examination, and then the application is sent to the home office, which in this case would be the San Francisco office of the Metropolitan.

The evidence will show and the surviving spouse of the insured—I mean the applicant, testified that she knew that a medical examination was required, and she herself went to the doctor's office and made an appointment for his examination by the examining physician. She made the appointment for 3:30 p.m., Friday the 13th of August, 1954. That morning at about 8:00 o'clock her husband, who was a crop duster, had an [6] accident in his airplane and he died.

So there was no medical examination, there was no completed application, and under the law where an application by an applicant is required to be submitted and is considered as an offer to the company, there was no offer ever made to the company to issue any policy of insurance.

I think the case is very clear-cut. There is a dispute, or will be, apparently, a dispute as to what was said by the agent with regard to the premium. The evidence will show that, in fact, the first premium was not the full premium. That, of course, is also one of the conditions precedent, that before a policy can be issued the full first premium must be paid.

The position of the Metropolitan in this case is a very simple one, Your Honor: There was no offer ever made to the Metropolitan for the issuance of this life insurance. The applicant himself did not comply with the conditions precedent to the approval of an application or the issuance of a policy.

It involves what the courts sometimes call "conditional receipts". This is not a case of a binding receipt. The receipt for the premium simply states, and it shows from the plaintiff's pleading, that there was received on account a certain sum of money.

So I think the evidence will show, Your Honor, that there was never even an offer by the applicant for insurance. And there is, I am quite sure, no evidence that the Company ever [7] approved any sort of a plan for this insurance before the soliciting agent wrote the first part of the application.

In fact, in the application, over the signature of the applicant, there is a definite limitation of the authority of the agent, and so the applicant, of course, was aware of the authority.

Thank you.

The Court: There is just one question in this case, and that is whether the insurance was in force at the time of death?

Mr. Walsh: That is right.

The Court: Call your first witness.

Mr. Boyle: The plaintiff will call Mr. George Price.

GEORGE PRICE

called by the plaintiff as an adverse witness, being first duly sworn, testified as follows:

The Clerk: Please state your name and occupation to the Court.

The Witness: George Price, Agent, Metropolitan Life Insurance Company in Watsonville.

Mr. Boyle: Your Honor, may counsel address a question to Mr. Walsh?

The Court: Yes.

Mr. Boyle: May we have the application in your possession, [8] Mr. Walsh?

Mr. Walsh: Yes, certainly. There is the application dated August 11, 1954. Is that the one you are requesting, Mr. Boyle?

Mr. Boyle: Yes. Will you hand me all parts of this, please, Mr. Walsh, that you have in your possession? It seems to me there are portions here removed from the bottom?

Mr. Walsh: There is a little strip here at the bottom that apparently came loose, either while it was in my possession or somewhere.

Direct Examination

By Mr. Boyle: Q. Mr. Price, how long have you been an agent for the Metropolitan Life Insurance Company? A. Going on 23 years.

Q. And how long have you been a resident of Watsonville, California?

A. Same length of time.

Q. In other words, during the past 23 years, then, you have been engaged as an agent for the

(Testimony of George Price.)

Metropolitan Life Insurance Company in Watsonville, California, and vicinity, is that true?

A. Yes.

Mr. Boyle: Your Honor, may we have permission to question this witness, cross-examine him, under Rule 43 as an adverse and hostile witness.

The Court: You may do so. [9]

Mr. Boyle: Q. Now, during that 23 years, Mr. Price, did you engage in any other occupation, other than the soliciting and selling of insurance for the Metropolitan Life Insurance Company?

A. No.

Q. And during that 23 years were you employed by any other company, other than Metropolitan Life Insurance Company? A. No.

Q. Now, referring to the date August 10, 1954, did you on that date know Peter Grant?

A. Acquaintance, yes.

Q. On that date, August 10, 1954, did you see Peter Grant? A. Yes.

Q. And where did you see him?

A. At his home.

Q. Where was his home?

A. On Sudden Street.

Q. In Watsonville, California? A. Yes.

Q. About what time of day did you see him on August 10, 1954?

A. At that time, to the best of my recollection it must have been approximately 7:30 in the evening.

Q. Was anyone else present when you saw Peter

(Testimony of George Price.)

Grant? A. Mrs. Grant was present.

Q. And Mrs. Grant is the plaintiff in this action, Mr. Price? [10] A. Yes, sir.

Q. Now, at that time did you have a conversation with Mr. Grant about an application for life insurance with the Metropolitan Life Insurance Company? A. Yes.

Q. And did you on that occasion have with you an official form of the Metropolitan Life Insurance Company for an application for life insurance?

A. Yes.

Mr. Boyle: Your Honor please, if we may have these papers marked for identification?

The Court: They may be marked.

Mr. Boyle: There are two papers, Your Honor. Possibly they should be attached and marked as one exhibit.

The Court: Yes, attach the one that has come loose and make it one exhibit.

(Application for life insurance marked Plaintiff's Exhibit 1 for identification.)

Mr. Boyle: Q. Mr. Price, I will show you what is marked Plaintiff's Exhibit 1 for identification. Will you please hold that document, study it carefully as I address the next questions to you.

On August 10, 1954, in the presence of Margaret Grant, did you address to Peter Grant the questions in Part A—— A. Yes. [11]

Q. ——of Plaintiff's Exhibit 1 for identification? A. Yes.

(Testimony of George Price.)

Q. And did Peter Grant answer those questions? A. Yes.

Q. And did you write his answers to the questions put by you on the face of Part A——

A. Yes.

Q. ——in your own handwriting?

A. Yes.

Q. That is, paying close attention to Part A, above the date and place of the application there are certain words, figures, numbers, marks and letters in ink. Were all of those words, figures, marks and numbers placed on Part A of the application by you in your own handwriting?

A. My own handwriting.

Q. Now, referring again to Part A of the application, three lines from the bottom where the printing begins “Sign by applicant” and “Dated at”, is the word “Watsonville” in your handwriting? A. Yes.

Q. And following the number 11, is that in your handwriting? A. Yes.

Q. And the word “August”, is that in your handwriting? A. Right.

Mr. Walsh: What part was that? [12]

Mr. Boyle: “August”.

Q. And similarly, the date “1954” is in your handwriting? A. Right.

Q. Is the signature “George Price” opposite the printed words “Witness to signature” your signature? A. Yes.

Q. Did you place your signature as a witness

(Testimony of George Price.)

at that place after Peter Grant had signed the application? A. Yes.

Q. Did you request Peter Grant to sign the application? A. I asked him to.

Q. Did he sign it in your presence?

A. He did.

Q. Having signed Part A of the application, did you request a sum of money from Peter Grant?

A. A tentative amount, yes.

Mr. Boyle: May we have the answer stricken as non-responsive, Your Honor?

The Court: It may be stricken.

Mr. Boyle: Will the reporter please restate the question to the witness?

(Question read by the reporter.)

A. Yes.

Mr. Boyle: Q. And what was the sum of money that you requested? [13] A. \$53.36.

Q. And did Peter Grant on that occasion give you a check in the sum of \$53.36 payable to the Metropolitan Life Insurance Company?

A. When?

Q. On August 10, 1954.

A. Not for that date.

Mr. Boyle: Will the reporter read the question to the witness?

(Question read by the reporter.)

A. He did.

Mr. Boyle: Q. What was the date on that check?

A. The date of that check was marked, to the best of my recollection, August 11th.

(Testimony of George Price.)

Q. The same date as Part A of the application, is that right?

A. Yes, but he asked me—may I go on?

Mr. Walsh: You have answered the question.

Mr. Boyle: Simply answer the question, Mr. Price.

The Court: Yes. Your attorney will have an opportunity to have you explain these matters.

The Witness: I see.

Mr. Boyle: Q. Now, having received that check from Peter—withdraw the question.

Was the check drawn on the Bank of America, National Trust & Savings Association, Watsonville, California? [14] A. Yes, sir.

Q. Now, having received that check from Mr. Grant, did you then issue him a receipt?

A. For the amount of money, yes.

Mr. Boyle: Your Honor please, may we—oh, pardon me, Mr. Walsh, I thought you had seen this (handing document to counsel).

Your Honor, if we may have this marked for identification?

The Court: It may be marked.

(Receipt marked Plaintiff's Exhibit 2 for identification.)

Mr. Boyle: Q. I will show you Plaintiff's Exhibit 2 for identification, Mr. Price. Is that the receipt that you gave to Peter Grant on August 10, 1954? A. Yes.

Q. Is all of the handwriting matter on that printed receipt in your own handwriting?

(Testimony of George Price.)

A. Yes.

Mr. Walsh: Just a moment. Do you mean on the front or on the back?

Mr. Boyle: On the face of the receipt.

The Witness: On the face of the receipt, yes.

Mr. Boyle: Q. Now, referring back, Mr. Price, to Plaintiff's Exhibit 1 for identification, there is on the back of that document, I believe, a portion entitled "Report of Inspection". Do you have it before you? [15]

A. I have it right before me.

Q. Now, in respect to that section, were all of the numerals, words, marks in ink placed by you in that portion of the application? A. Yes.

Q. And similarly, did you sign that portion of the application, "George I. Price, Agent"? .

A. Yes.

Q. And similarly, at the bottom under the section entitled "Policy to be issued to the credit of", the matters in ink in that portion were written by you in your handwriting? A. Yes.

Q. And that likewise was done in Mr. Grant's presence on August 10, 1954? A. Yes.

Q. Now, attached to the application is a portion which apparently was torn off. There are two sections entitled "To be completed by agent". Have you found it? A. Right here.

Q. There are certain words, figures and numbers written there in those two sections in ink. Were they written in by you in your own hand-

(Testimony of George Price.)

writing on August 10, 1954, when you talked with Mr. Grant? A. Yes.

Mr. Boyle: Now, may I see the original exhibit, please? [16]

Your Honor, we will offer Plaintiff's Exhibit 1 for identification in evidence.

Mr. Walsh: You are offering it in evidence?

Mr. Boyle: Yes.

The Court: It may be admitted.

Mr. Boyle: And we will at this time offer Plaintiff's Exhibit 2 in evidence.

The Court: It may be admitted.

(Documents previously marked Plaintiff's Exhibit 1 and 2 for identification admitted into evidence.)

[See page 13.]

Mr. Boyle: May I address an inquiry to counsel for the defendant, Your Honor?

The Court: You may.

Mr. Boyle: Mr. Walsh, there are in our files, produced by you, two other forms, one relating to armed service status, Form 0365WR. Do you have that in your possession?

Mr. Walsh: Yes, I have.

Mr. Boyle: May we have it?

May we have this document marked for identification, Your Honor?

The Court: It may be marked.

(Document entitled "Armed Service Status" marked Plaintiff's Exhibit 3 for identification.)

Mr. Boyle: Q. Mr. Price, I show you Plaintiff's

(Testimony of George Price.)

Exhibit 3 for identification. In addition to the printed material on [17] the paper, there are certain words, letters and marks in ink above the date. Now, on August 10, 1954, did you write those words, figures, marks and letters in your own handwriting on that document? A. Yes.

Q. Was the information written by you obtained by questioning Mr. Peter Grant? A. Yes.

Q. And the various answers or marks indicated were Peter Grant's responses to those questions?

A. Yes.

Q. Now, similarly, was material "Dated at Watsonville" in ink, "this 11th" in ink, "August—" Aug., an abbreviation,—and "1954" written by you in your handwriting? A. Yes.

Q. Did Peter Grant sign Plaintiff's Exhibit 3 in your presence on August 10th? A. Yes.

Q. And did you then sign your name as a witness? A. Yes.

Mr. Boyle: We will offer the document, Your Honor.

The Court: It may be admitted.

(Document previously marked Plaintiff's Exhibit 3 for identification admitted into evidence.)

Mr. Boyle: Again, may I address counsel for the defense, [18] Your Honor?

The Court: Yes.

Mr. Boyle: Mr. Walsh, similarly we have a document "Life Inquiry, Account No. 30-A" in our possession. Do you have the original?

(Testimony of George Price.)

Mr. Walsh: What is the date of that?

Mr. Boyle: There doesn't seem to be a date on the photostatic copy.

Mr. Walsh: Is this the one?

Mr. Boyle: Yes. May I have this document marked for identification, Your Honor?

The Court: It may be marked.

(Document entitled "Life Inquiry" marked Plaintiff's Exhibit 4 for identification.)

Mr. Boyle: Q. Mr. Price, I will show you Plaintiff's Exhibit 4 for identification. In addition to the printed material on that document there are written words, letters, numbers and figures. Were those words, numbers, letters and figures written in by you? A. Printed in by me.

Q. And were they printed in your handwriting on August 10, 1954?

A. Not at that date. Not at the same date, because we usually complete these forms after the application is obtained at home. [19]

Q. Was that form completed on August 11, 1954?

A. I would say approximately that date.

Mr. Boyle: We will offer Plaintiff's Exhibit 4 for identification.

Pardon me, Your Honor, is Plaintiff's Exhibit 3 for identification in?

The Clerk: Yes.

Mr. Boyle: We will offer the document, Your Honor.

The Court: It may be admitted.

(Testimony of George Price.)

(Thereupon document marked Plaintiff's Exhibit 3 for identification was admitted into evidence.)

Mr. Boyle: Q. Now, Mr. Price, after Mr. Grant signed Part A of the application, gave you his check, and you gave him a receipt, did you take the application with you? A. Yes.

Q. And you left the receipt with Peter Grant?

A. Yes.

Q. Did the application ever return to Peter Grant's possession? A. No.

Mr. Boyle: Now, if I may have Exhibit 1, Mr. Clerk?

Q. I will show you Plaintiff's Exhibit 1, Mr. Price, and I will refer you specifically to the section numbered 16, "Plan of insurance desired", in ink the following letters and abbreviations appear: "W. L. Fam. Inc." Will you tell me what the letters W.L. stand for? [20] A. Whole life.

Q. And will you tell me what the abbreviation "Fam. Inc" means? A. Family income.

Q. Will you state what benefit, if any, was to be payable under the Whole life provision of this application?

Mr. Walsh: Pardon me, may I have that question?

(Question read by the reporter.)

(Colloquy off the record.)

Mr. Boyle: Q. Would you like the question re-read, Mr. Price? A. No.

Q. All right.

(Testimony of George Price.)

A. "Whole Life" is the determination of the type of insurance. "Family income"——

Q. (Interposing). Mr. Price, the question was limited to the benefit, if any, payable under the Whole Life provision, the amount.

Mr. Walsh: Well, Your Honor please, I think that would call for a rather long answer if——

The Court: (Interposing) There is no dispute about it, is there?

Mr. Walsh: If all the provisions of a policy, if a policy had been issued upon the plan applied for, of course it would be a policy with a lot of provisions, and I doubt very much if anyone could tell what it is or what those are from memory. [21]

Mr. Boyle: Your Honor, I will withdraw the question and reframe it.

Mr. Boyle: Q. What was the amount of the "Whole Life" aspect of the policy?

Mr. Walsh: If Your Honor please, I object to that because the application in writing speaks for itself.

The Court: Yes, I think that's true. The only reason why the objection will be sustained is, I think it is very clear the policy is in evidence.

Mr. Walsh: Very well, Your Honor.

Mr. Boyle: Q. Now, referring to the "Family income" provision, what was the amount of the family income provision?

Mr. Walsh: I object to that on the ground that the application doesn't show the amount.

(Testimony of George Price.)

The Court: I will let him answer.

The Witness: Basically, the family income referred to is receiving an income of \$10.00 a month for each \$1,000.00 of insurance purchased.

Mr. Boyle: Q. For what period of time?

A. For a duration, from the date of the application to the end of 20 years.

Mr. Boyle: Thank you. May counsel confer, Your Honor?

The Court: Yes.

The Witness: I beg your pardon, I haven't completed your answer. [22]

Mr. Boyle: Q. Please do so, Mr. Price.

A. If Mr. Grant lived five years, there would be a difference of 15 years under the family income provision paid his widow.

Mr. Boyle: Q. That is, Mr. Price, that the family income provision is depreciable over a period of 20 years? A. Correct.

Q. In other words, at the end of one year there is but 19 years? A. Right.

Q. It is term insurance, isn't it?

A. That is term insurance, that part of it.

Mr. Boyle: No further questions at this time, Your Honor. We may wish to recall Mr. Price.

The Court: Do you have any questions?

Mr. Walsh: You wanted to recall Mr. Price later?

Mr. Boyle: We may, Mr. Walsh. I am not quite sure. It depends on how the evidence evolves.

(Testimony of George Price.)

Cross Examination

By Mr. Walsh: Q. I would like to ask a few questions. Mr. Price, I show you Plaintiff's Exhibit No. 1, which consists of a printed form of application to Metropolitan Life Insurance Company, consisting of Part A, Part B, Part C, and another part that is not numbered.

A. D, medical.

Q. You were asked if on August 10, 1954, you wrote in the [23] answers to certain questions on Part A of this application. Did you first ask Mr. Grant the questions? A. Yes.

Q. And then the answers that you wrote down were true and correct answers to the questions that you asked him, were they?

A. According to his statement, it was written down as he gave them to me.

Q. That is the questions that you had to ask him, he gave you the answers orally and you correctly put those answers in this application, Part A, in your own handwriting, is that correct?

A. Yes, sir.

Q. And then after that was done you had him read it over, did you?

A. He was present and he was able to see everything that was written as I wrote it down.

Q. In other words, as you were asking those questions, you had that application before you so that he could see actually what you wrote on there, is that correct?

A. He was sitting to my left.

(Testimony of George Price.)

Q. Yes, and he could see what you wrote?

A. He could see everything.

Q. After that had been filled in, then he signed it, did he? A. Yes, sir.

Q. Then you signed as a witness?

A. As a witness. [24]

Q. This little slip that is attached here, now attached to Part B of the application, actually—down at the bottom it is perforated, isn't it?

A. Yes.

Q. That strip that is now attached to Part B of the application at that time was attached to the lower part of A and B of the application, is that correct? A. Yes.

Q. You are indicating right across the bottom?

A. That is right, to the left.

Q. I call your attention to Part A of the application up at the top. In printing it says "Medical" does it not?

A. It says "Medical", yes, sir.

Q. That is on Part A? A. Part A.

Q. And Part B—the B is in large type as the A is on Part A, and this is a four-page sheet of the pamphlet type, is that correct?

A. Yes, sir.

Q. And that is always kept intact, is that correct? A. Yes, sir.

Q. It is never torn in two? A. Never.

Q. I call your attention to Part B, which also in printing says at the top, "Application to the Metropolitan Life [25] Insurance Company, Ordi-

(Testimony of George Price.)

nary Department” and below that, “Applicant’s statements to the medical examiner”. Is that correct? A. Yes, that is correct.

Q. On Part B of the application there is a long list of questions. Above that it says, “The spaces below are for the applicant’s answers only. Nothing but his answers should be inserted. Statements of or comments by medical examiner must be recorded in Part C.”

Now, referring again to Part B, are there any answers to any of those questions?

Mr. Boyle: Your Honor, I interpose the objection that the document itself is the best evidence.

The Court: I think that is right. I will let him answer.

The Witness: Are you speaking as far as the agent is concerned?

Mr. Walsh: I will withdraw the question.

Q. Do you know what the purpose of Part B of the application is? A. Medical.

Mr. Boyle: Objection, Your Honor. It calls for the conclusion of the witness.

The Court: Well, it does, but this being a court trial I will permit his answer to stand.

Mr. Walsh: Q. I will show you Plaintiff’s Exhibit No. 2 [26] and I want to point out something that counsel for the plaintiff did not, and that is that on this receipt, down in the left-hand corner, it says, “Appointment for medical examination.” Now, is that your handwriting in there?

(Testimony of George Price.)

A. Yes, sir.

Q. What does it say?

A. It says, "Not Thursday."

Q. What else does it say?

A. Dr. Blaisdell.

Q. What else does it say?

A. It says "The first small office".

Q. Did you have a conversation with Mr. Grant the night of August 10th at his home in Mrs. Grant's presence with respect to that part of the receipt?

A. Yes, sir.

Q. Who is Dr. Blaisdell?

A. Our examining doctor in Watsonville, at 850 Main Street.

Q. What did you say to Mr. Grant with respect to Dr. Blaisdell?

A. I asked Mr. Grant if he could possibly go up Wednesday. He said he was very busy, couldn't make it.

Q. Pardon me just a moment. We are back in 1954. Wednesday was what day of the week?

A. To the best of my recollection, three years ago I think Wednesday was August 11th.

Mr. Walsh: I think the Court will take judicial notice [27] of the dates, but if I may refresh the Court's recollection, I have here a 1954 calendar—(showing to counsel).

Mr. Boyle: There is no question about it.

Mr. Walsh: This might be of assistance to all of us. We are talking about the month of August, 1954.

(Testimony of George Price.)

The Witness: Yes, sir.

Mr. Walsh: Q. August 10th, according to this calendar, was a Tuesday. A. Right.

Q. August 11th Wednesday, August 12th Thursday, and the 13th was a Friday. Now, as I understand your testimony, this application, the receipt and the check were all dated August 11th, although they were actually executed the evening of August 10th. A. Yes, sir.

Q. Which was a Tuesday, is that correct?

A. Right.

Q. May I ask why they were all dated August 11th?

A. We make out a cash sheet every day. For that Tuesday our cash sheet was closed. We are supposed to account for that money or any moneys on the date we collect it, and the only day I could put that money in was the next day. I mean, ordinarily.

Q. Was there any other reason? Did either Mr. or Mrs. Grant ask you to hold the check? [28]

A. They asked me to hold the check for a few days.

Q. And you did? A. Yes, sir.

Q. And therefore you dated the application——

A. On a business day.

Q. A day ahead, August 11th?

A. Yes, sir.

Q. Although they were actually signed——

A. On the evening of the 10th, approximately 7:30 or 8:00.

(Testimony of George Price.)

Q. Getting back to the receipt, Exhibit No. 2—it might make it a little clearer, Your Honor, if I explain a little what this shows. It says, “Received from Peter Grant, Fifty-Three and 36 one-hundredths dollars on account of application made this day to the Metropolitan Life Insurance Company. If the sum collected at the time Part A of this application is signed is at least equal to the full first premium on the policy applied for, and if such application is approved at the Company’s home office for the class plan, and amount of insurance therein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from this date.”

Then there is further language, and down in the left-hand corner is this part I am talking about of an appointment for medical examination, and written in in Mr. Price’s handwriting is, “First small office, Date not Thursday,” and below that [29] “Dr. Blaisdell”.

This was down in Watsonville, wasn’t it?

A. Yes.

Q. Again calling your attention to that notation on the receipt about Dr. Blaisdell, what on the night of August 10, 1954, did you tell Mr. Grant with respect to Dr. Blaisdell?

A. I explained to Mr. Grant that our examining doctor was Dr. Blaisdell and suggested that inasmuch as he was working when he was called upon to do so, depending upon flying conditions and so forth, that he make his own appointment.

(Testimony of George Price.)

Q. You suggested to Mr. Grant——

A. That is right, because I couldn't—I couldn't get any definite time from him as far as the time would be permissible for him to see the doctor.

Q. This application that you had at that time, Plaintiff's Exhibit No. 1, a pamphlet of four pages, when you were filling that out, you had that open, did you? A. Yes.

Q. Did you by any means make Mr. Grant aware that it was required that he have a medical examination?

Mr. Boyle: I object to that as leading, Your Honor.

The Witness: Yes, sir.

Mr. Boyle: I move to strike the answer.

The Court: This being a court matter, I will let the answer stand subject to your objection. [30]

The Witness: May I speak further?

Mr. Boyle: May it please Your Honor, it has been apparent, even on the direct examination of this witness, that he was attempting to anticipate a defense to this thing, and similarly Mr. Walsh's questions have been so framed. I like to be liberal and attempt not to interfere with a counsel's cross-examination of the witness, but I must at this point, Mr. Walsh, inform you that I will stop and make objections for the record if this proceeds further.

Mr. Walsh: I would like to respond to that, if Your Honor please, and state——

The Court: Well——

(Testimony of George Price.)

Mr. Walsh: I will submit it then.

The Court: I will let him answer subject to your objection, and I will strike it — I will not be prejudiced in any way by any testimony here that I think an objection should be sustained to. What is the question here that you have asked?

(Question read.)

The Court: The answer may be stricken. He may state what the conversation was, but in that form I will strike the answer.

Mr. Walsh: Q. What was the conversation with respect to medical examination, if any, at that time?

Mr. Boyle: Your Honor, again may I interpose one other objection, which will be made several times, I anticipate, [31] during the course of this proceeding. If Your Honor will read carefully the entire Part A of the receipt, it is very apparent that a written contract was made of some kind at that time. Now, this offer, I take it, is for the purpose of introducing oral evidence, not to explain the circumstances, but to vary the wording of the contract made. There is nothing said in the receipt about taking a medical examination as a condition — nothing in that receipt at all. It is not incorporated into the contract as a condition precedent. I take it that the purpose of this is that Mr. Price will say, "I told him he didn't have any insurance." But, you see, that flies in the face of the receipt that was issued. We will object to the question on the ground that it violates the extrinsic evidence

(Testimony of George Price.)

rule, that it is an attempt to vary a written contract by parole evidence.

Mr. Walsh: That is a strange thing coming from counsel because their own case is predicated not upon the receipt, not upon the true application, Your Honor. If you will look at Exhibit A attached to plaintiff's amended complaint, you will find that they base their cause of action upon a written contract, which consists of only Part A of the application and this receipt. Now, in variance of their allegations, they are introducing into evidence an entirely different thing, and now they want to preclude me from asking about it. They put them in evidence and then they object to my bringing to [32] the attention of the Court what these documents show and what transpired. He asked about the conversation on the night of August 10th and I am entitled to go into the entire conversation, and contrary to counsel's ground for objection, I would like to call the Court's attention to Part A of the application, which, by the way, they plead as their contract, that the statements and answers in Part A and in Part B of the application for this insurance shall form the basis of the contract of insurance if one be issued. It is certainly material to this case whether Part B was ever executed at all. And yet he wants us to be precluded from pursuing that line of inquiry. That is one of the bases upon which they are suing us. If it is the plaintiff's position that they want to stand on the contract that they pleaded, I will be very glad to move for

(Testimony of George Price.)

dismissal because they have not proved any contract whatsoever.

Mr. Boyle: May it please Your Honor, it is very apparent why we have offered this entire document, to prove the agency and the scope of his authority. Note, for instance, on the back of this document, "Please read instructions carefully before you write the application," and then follows the instructions to the agent. Similarly the other documents we have introduced indicate the general authority and scope of this man's agency for the Metropolitan.

The Witness: Your Honor——

Mr. Walsh: As far as the agency is concerned, I would like [33] to call Your Honor's attention to this Part A over the signature of the applicant: "No agent, medical examiner or any other person except the President, Vice-President, Actuaries, Treasurers, or Secretaries of the Company has power on behalf of the Company to make, modify or discharge any contract of insurance or bind the Company by making any promises respecting any benefits under any policies issued hereunder. No statements made to or by and no knowledge on the part of any agent, medical examiner or any other person as to any facts pertaining to the application shall be considered as having been brought to or brought to the knowledge of the Company unless stated in either Part A or Part B of the application for its insurance."

The applicant had knowledge of the limitation of the authority of the agent. The cases on that are

(Testimony of George Price.)

numerous, and hold that when an applicant signs an application he knows then of the limitation of the agent. He is bound by that. This man is a soliciting agent, and the scope of his agency is strictly limited, and is brought to the attention of the applicant by reason of the fact that he signs it.

The Court: It is time for the morning recess. I will take a recess for 15 minutes.

(Recess.)

The Court: The witness may return to the stand.

(The witness, George Price, resumed the witness stand.) [34]

Cross Examination—(Continued)

The Court: The objection will be sustained. By this ruling I am not saying that I will not hear you on this question again when you put on your defense.

Mr. Walsh: Very well.

Q. Now, Mr. Price, I will again show you Exhibit A, the original application, and you were asked under "Report of Inspection" if you wrote those things in there that appear in handwriting?

A. Yes, sir.

Q. And that has to do—may I have it for a moment—that has to do with questions such as "Where was the application written?" "Give information available as to amount and source of applicant's annual income," the race, height, weight, and so forth.

Mr. Boyle: Pardon me, Mr. Walsh, I cannot fol-

(Testimony of George Price.)

low that in my copy. Oh, pardon me, I have the wrong one.

Mr. Walsh: Q. Well, you were asked about that by counsel. I will ask you where you obtained the answers, obtained that information that you put in there in that part of the application.

A. After Part A was filled in, the face of the application, then I wrote the report of inspection afterwards, after that.

Q. From whom did you obtain the information you put in there under "Report of Inspection"?

A. From Mr. Grant.

Q. I see. Question 8 of Part A of the application is "Occupation and duties". You wrote in answer to that question of two parts, Occupation A and B is "Duties", and it appears here his occupation was crop duster, and duties "Dusting crops by plane."

That information that you wrote in there you obtained from Mr. Grant at that time on August 10th in his home? A. Yes, sir.

Q. Now, this Exhibit No. 2 of the plaintiff's, the receipt with the part for appointment for medical examination, was that attached to this exhibit No. 1, the application?

A. Yes, the lower part from left to right.

Q. That was attached to the lower left part of Part A of the application? A. Yes, sir.

Mr. Walsh: In view of Your Honor's ruling, I should like to call Your Honor's attention to the

(Testimony of George Price.)

provisions of Exhibits 1 and 2. As I mentioned, it is in pamphlet form.

Q. Mr. Price, the only parts that were detached are those things such as this receipt which was in the lower left-hand corner of Part A?

A. Correct. Perforated.

Q. And this strip that has become detached since then, adjoined that, did it? [36] A. Yes, sir.

Mr. Walsh: And that was on there. And I may say, Your Honor, that that became detached after it was in my possession, except the receipt.

Now, calling Your Honor's attention to the application, in large letters "Part A, Part B". Part B, in printing in large type, at the top just like in Part A it says, "Application to the Metropolitan Life Insurance Company." And below that in parentheses "Ordinary Department".

Below that it says "Applicant's statement to the Medical Examiner". Below that, "The spaces below are for the applicant's answers only. Nothing but his answers should be inserted. Statements of or comments by medical examiner must be recorded in Part C."

Below that is a long list of questions such as "Are you now in good health and able to carry out your full duties?" 2—and ten there are several parts to that: "When were you last sick? Month, year, name of doctor, nature of sickness, doctor's diagnosis if you had a doctor, how much time have you lost from school or work in the past five years on account of bad health," and so on, and then a

(Testimony of George Price.)

long list of specific questions going to specific ailments and diseases.

And down at the bottom is printed, "I have read the foregoing answers before signing. They have been correctly written as given by me and are true and complete. There are [37] no exceptions to any such answers other than as stated herein."

"Dated this day of," and so forth. "Signature of applicant". "Witness to signature, M.D."

That apparently calls for the signature of the applicant and the signature is witnessed by the M.D.

And then Part C, the medical examiner's report on, and it says, "Insert full name of applicant".

Examination must be made in private. No agent or other field representative to be present to see or report. Your findings and opinion, whether favorable or unfavorable, should never be discussed with the applicant or any other person. Upon completion of your report, forward immediately to the Company's home office, ordinary department.

"If examination is refused, please return the uncompleted form to the District Manager stating particulars." "The matter of delicacy or doubt affecting a risk, or if you have facts or impressions not covered in your report, write directly to the medical division and attach your letter securely to this report. Be sure to enter the applicant's name on any supplementary report.

(Testimony of George Price.)

“When in doubt as to how impairment should be recorded, see Company’s booklet ‘Instructions to Medical Examiners’”.

“Measure applicant’s height, chest and abdomen. Weigh the applicant on an accurate scale whenever possible. However, this must be done if the amount applied for is over \$10,000.00 [38] (over \$5,000.00 on the family income or endowment plan).”

And I call Your Honor’s attention to Part A where the amount of insurance applied for is \$10,000.00, and the plan is Whole Life Family Income.

Then going on from Part C, there are a number of things for the medical examiner to fill out, including height, weight, and so forth, and other findings.

Now, again I wish to call Your Honor’s attention to the fact that over the signature of the applicant dated August 11, 1954, it says, “The foregoing statements and answers are true and complete. It is agreed, (1) the statements and answers to Part A and Part B of this application for this insurance shall form the basis of a contract of insurance if one be issued.”

And then the limitations on the authority of the agent which I have previously read.

Then, still reading from the application, “The Company shall incur no liability under this application until a policy has been delivered and the full first premiums specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the ap-

(Testimony of George Price.)

plicant, in which case such policy shall be deemed to have taken effect as of the date of issuance as recited herein, except as follows:

“If an amount equal to full first premium on the [39] policy applied for is paid to and accepted by the Company at the time Part A of this application is signed, and if this application is approved at the Company’s home office for the class, plan and amount of insurance herein applied for, then the insurance in accordance with the terms of policy applied for shall be in force from the date hereof.”

The receipt states that the \$53.36 is on account of the application. There is no statement in there that there is a full first premium.

Question 23 of Part A of the application. 23-A: “What amount has been paid in advance on account of the first premium?” There is written in “\$53.36”. There is nothing anywhere in the written documents that states that the full first premium was paid.

Mr. Boyle: Pardon me, Your Honor. If Mr. Walsh wants to argue this case at this time, I am quite well prepared. I fail to see what the purpose of this discussion is. I know I will well answer his statements.

The Court: All right. There is nothing for the Court to rule on right at this time.

Mr. Boyle: Thank you.

Mr. Walsh: Q. Mr. Price, what did you do with the application after the night of August 10th?

Mr. Boyle: Your Honor, I believe that is beyond

(Testimony of George Price.)

the scope of the direct examination. I will accordingly object. Mr. [40] Price testified that he took the application with him.

The Court: I think I will make the same ruling on that. The objection will be sustained, but not to preclude you from putting on your defense.

Mr. Walsh: Very well, Your Honor.

Q. Mr. Price, you received a check for \$53.36, you testified, on the night of August 10th but it was dated August 11th. What reason was given for post-dating the check?

A. He asked me to hold the check for a few days, that he expected some money to deposit.

Q. What did you do with the check?

A. I held it as he had asked me to.

Q. What ultimate disposition did you make of it? A. Finally——

Mr. Boyle: Objection, Your Honor; beyond the scope of the direct examination.

The Court: Objection will be sustained.

Mr. Walsh: Very well. No further questions.

Mr. Boyle: A few questions, Your Honor.

Redirect Examination

By Mr. Boyle: Q. Mr. Price, on the evening of August 10 Mrs. Grant was sitting at the table with you and Mr. Grant, was she not?

A. Sitting on the chesterfield and behind the coffee table.

Q. Now, when you asked for \$53.36, did Mrs.

(Testimony of George Price.)

Grant move from [41] the coffee table to the dining room table?

A. I just can't recall that.

Q. Did she get out a check book?

A. That I can't recall, either, but I have a faint recollection that she made out the check.

Q. Now, isn't it a fact, Mr. Price, that on that occasion Mrs. Grant took her check book and noted the balance, and either Mrs. Grant or Mr. Grant told you that she would date the check August 11th because on the following day Mr. Grant would secure four or five hundred dollars from his employer and deposit it in the bank on August 11th?

A. To the best of my recollection, I can't recall any such statement.

Q. Then, Mr. Price, on that evening you issued a Company's official receipt for a bad check, is that right?

Mr. Walsh: Just a moment. I think the receipt speaks for itself.

The Court: Yes, it may. I certainly think the premium was paid; that is, the check was paid and he accepted it. Whether it was any good or not, he accepted it and gave a receipt for it.

Mr. Boyle: Now, may I have Exhibit 1?

Q. Referring to that portion of Exhibit 1 entitled "Report of Inspection", I think you have testified in response to a question from counsel that those answers were written in response to questions which you put to Mr. Grant on that [42] occasion. Now, note at the bottom, just above your signature,

(Testimony of George Price.)

“Above is the result of my personal, careful investigation”.

Now, it is a fact, is it not, that you had made such a personal, careful investigation of Mr. Grant, that some of these questions, the answers were written in by you of your personal knowledge, were they not?

A. Are you speaking of the Report of Inspection?

Q. Yes.

A. They were written in after questioning Mr. Grant, because it is all interrogatories.

Q. Well, in Question 5, “Is there anything unfavorable as to applicant’s character, habits or mode of living?”

A. To the best of my knowledge, there wasn’t any.

Q. And as a matter of fact, over the course of a couple of months you had been soliciting Mr. Grant and had made this investigation that the statement says, isn’t that true?

A. I beg your pardon?

Q. You had made this personal, careful investigation that your statement says?

A. I had made no investigation except on Company business. I had not investigated Mr. Grant’s personal character.

Q. And yet you stated in question 5 that his character, habits and mode of living were favorable?

(Testimony of George Price.)

A. That is simply the Company's way of finding out what the agent's observation is. [43]

Q. Well, that was based on your observation?

A. Observation.

Mr. Boyle: That is all. Just one moment, Mr. Price.

Mr. Walsh: No questions.

Mr. Boyle: I have just one more.

Mr. Walsh: Oh, I am sorry.

Mr. Boyle: Q. Mr. Price, again, in the 23 years that you have been doing business for the Metropolitan Life Insurance Company, you have been very careful to follow the Company's instructions, have you not? A. Explicitly.

Q. I call your attention to Exhibit 1, instruction numbered 1. Will you please read it?

A. "The full premium must be obtained in advance when payable monthly, in all cases. It should be obtained whenever possible."

Q. The payment here was payable monthly, was it not, Mr. Price? A. Correct.

Mr. Boyle: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Boyle: I will call Mrs. Kenny.

MARGARET KENNY

the plaintiff herein, called as a witness in her own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Mrs. Margaret Kenny.

The Clerk: What is your occupation, if any?

The Witness: I am a housewife.

Direct Examination

By Mr. Brauer: Q. You are the plaintiff in this action? A. That is right.

Q. And your present name is Mrs. Kenny?

A. That is right.

Mr. Brauer: I would like to move the Court to amend the complaint to set forth the plaintiff's present name.

The Court: It may be so amended.

Mr. Brauer: Q. You are the widow of Peter Grant, are you? A. Yes, I am.

Q. Did you and Mr. Grant have any children?

A. Yes, we had two boys.

Q. And what are their names?

A. Peter and John.

Q. What are the ages?

A. Fourteen and eight.

Q. Are you remarried now? A. Yes, I am.

Q. When did you remarry?

A. November 10, 1956.

Q. And your husband, what is his name? [45]

A. Gerald P. Kenny.

Q. Where do you reside now?

A. At Davis, California.

(Testimony of Margaret Kenny.)

Q. I call your attention to the month of August, 1954. Where did you reside then?

A. 111 Sudden Street, Watsonville.

Q. How long had you resided at that address prior to August, 1954? A. Two months.

Q. Do you recall approximately when you moved to that address?

A. Around the latter part of May or first part of June.

Q. Of 1954? A. 1954.

Q. How long prior to that had you lived in the vicinity of Watsonville, California?

A. A year and a half.

Q. Now, Mrs. Grant, what was the occupation—pardon me, I am so used to calling you Mrs. Grant that I may keep on doing that. What was the occupation of Peter Grant in 1954?

A. Mr. Grant was a crop duster pilot. He dusted crops and orchards with spray and dust by airplane.

Q. How long had he had that occupation?

A. Since 1951.

Q. Since 1951? A. Yes. [46]

Q. Till the date of his death? A. Yes, sir.

Q. Do you know George Price?

A. Yes, I do.

Q. When did you first meet Mr. Price?

A. Shortly after we moved to Sudden Street.

Q. And that would have been approximately when?

A. First of June, around the first.

(Testimony of Margaret Kenny.)

Q. At the time you had your first meeting with Mr. Price, who was present?

A. Just Mr. Price and myself.

Q. And do you remember what was said on that occasion?

A. Mr. Price came in and introduced himself, said that he was the Metropolitan agent, knowing that we already had a policy with them, and he wanted to introduce himself and let us know who he was and if we wanted any information that we knew where to get hold of him.

Mr. Brauer: Can the Court hear the witness?

The Court: Yes. I don't know whether counsel can.

Mr. Walsh: I can't hear the witness.

The Court: Speak just a little louder.

The Witness: All right.

Mr. Brauer: Q. Was anything else said about that application?

A. No, there was not. [47]

Q. Did you have another conference, another meeting with Mr. Price thereafter?

A. A few days later Mr. Price came.

Q. And where did that conversation take place?

A. On Sudden Street at our home.

Q. Who was present there?

A. Just Mr. Price and myself.

Q. When did that take place, approximately, if you can recall?

A. It is hard to say. I know it was just a few days after the first visit.

(Testimony of Margaret Kenny.)

Q. And the first visit you testified was in the early part of June, 1954?

A. That is right.

Q. What was said on that second occasion?

A. Mr. Price first asked if Mr. Grant was there and I said no, that he was working, and we talked about a number of things. And then we got to the conversation of insurance, and he asked if Mr. Grant was interested in any more insurance, and I said that he had talked about taking it out but that he would have to talk to him about that.

Q. What else was said?

A. I told Mr. Price that I would have Mr. Grant call him or he could call Mr. Grant. I don't know which happened.

Mr. Walsh: If Your Honor please, I think all of this is entirely irrelevant and immaterial. I move that the testimony [48] be stricken.

The Court: I think so.

Mr. Brauer: Your Honor, may I address myself to that point? The purpose of this testimony, of course, is not to vary a written agreement. It is merely to acquaint the Court with the background of the negotiations. I believe the law to be that once the agency of an agent has been established, the negotiations leading up to the business which he transacts are admissible. This line of testimony is also relevant in determining the extent of the investigation which the defendant had made prior to writing the application, and consequently bears on their approval of the risk.

(Testimony of Margaret Kenny.)

The Court: On your objection I ruled out or sustained your objection to the first witness here testifying as to certain conversations that took place.

Mr. Brauer: Your Honor, as I recall the Court sustained our objection as to alleged testimony as to whether a medical examination was required before the application was effected. That testimony would have been in direct conflict with the written contract and it was on that basis that the objection was made. I do not believe the situations are identical.

The Court: I will not rule too strongly on objections here because it is a matter the Court is trying, and if I decide when this case is submitted to me that I should have sustained an objection to any question that I did not sustain [49] I will not consider it. I will let her go ahead and tell her story.

Mr. Brauer: I do not think this line of testimony will take too long, Your Honor.

Mr. Walsh: Do I understand the Court's ruling is this testimony so far be stricken out?

The Court: I will let it in, but I may later strike it as not being relevant to what we are trying here. I am inclined to think that the contract and what was in writing is possibly the ruling factor in this case. I will let her go ahead and tell her story, however.

Mr. Walsh: Thank you.

(Testimony of Margaret Kenny.)

Mr. Brauer: Q. When did you next have a conversation with Mr. Price, if you recall?

A. Mr. Price called up, if I remember right, and made an appointment to see Mr. Grant toward the end of June, but the exact date I don't know.

Q. Were you present at that conversation?

A. Yes.

Q. And who was present at that conversation?

A. Mr. Price, myself and Mr. Grant.

Q. Do you recall what was said?

A. Mr. Grant was very interested in finding out first whether his first policy that he had with the company, whether he was covered under his occupation. [50]

Mr. Walsh: I move that that be stricken as not responsive.

Mr. Brauer: I will concede that is irrelevant, if Your Honor please.

The Court: It may be stricken.

Mr. Brauer: Q. Go on, please.

A. And they talked—Mr. Price asked Mr. Grant if he was interested in any more insurance, and Mr. Grant said he definitely would like to take out a straight life policy, and Mr. Price asked him what amount, and he said \$10,000.00.

Q. Do you recall if anything else was said at that time?

A. Not to my knowledge.

Q. Do you know whether there was any other conference between Mr. Price and your husband during the month of June?

(Testimony of Margaret Kenny.)

A. Well, I never remembered any, but you have showed me a letter in the last day or so that they have that Mr. Price must have had a meeting with Mr. Grant when I was not there.

Q. But you were not present?

A. I don't remember it at all.

Q. When were you next present at a meeting with Mr. Grant and Mr. Price?

A. I believe the middle of July.

Q. The middle of July?

A. The middle of July.

Q. And Mr. Price and your husband and you were present at that time? [51]

A. That is correct.

Q. What was said then?

A. Mr. Price told Mr. Grant, if I remember right, that the company would have to have more information on his flying before they would even consider insuring him, and he took that information, and Mr. Grant signed it.

Mr. Brauer: Counsel, may I have that aviation questionnaire?

Mr. Clerk, will you mark this for identification, please?

(The aviation questionnaire of the Metropolitan Life Insurance Company referred to was thereupon marked Plaintiff's Exhibit 5 for identification.)

Mr. Brauer: Q. Mrs. Grant, I show you a paper entitled "Aviation Questionnaire, Metropolitan Life Insurance Company," which purports to bear the

(Testimony of Margaret Kenny.)

signature of Peter Grant, and ask you whether you recognize that?

A. Yes, that looks like it.

Q. What is that document as you recall?

A. I didn't understand.

Q. Is that the document that was signed by your husband on the occasion around July 15th that you just testified to?

A. Yes, it is.

Q. Who asked those questions that appear?

A. Mr. Price asked Mr. Grant.

Q. Mr. Price asked those questions?

A. Yes. [52]

Mr. Brauer: Your Honor, I will offer this as Plaintiff's next in order.

The Court: It may be admitted.

(Plaintiff's Exhibit 5 for identification was thereupon received in evidence.)

Mr. Brauer: Q. Do you recall whether anything else was said at that meeting on or around July 15, 1954?

A. I believe that they discussed insurance. Mr. Grant wanted a straight life policy so bad, but Mr. Price told him about the insurance for the family protection which he thought would be a better policy.

Q. What was said?

A. Mr. Grant asked Mr. Price what it would run, and Mr. Price said that he would look it up, and he looked it up and the base of the policy was \$400.00 a year for \$10,000.00 life with family protection rider.

(Testimony of Margaret Kenny.)

Q. Did you say \$400.00? A. A year.

Q. Did he say exactly \$400.00?

A. Yes, I believe he did.

Mr. Walsh: Pardon me. Are you still talking about this fourth visit?

Mr. Brauer: Yes, her testimony is with regard to the visit around July 15th.

Mr. Walsh: The middle of July. [53]

Mr. Brauer: The middle of July.

Q. Was anything said at that time with regard to aviation premium?

A. Mr. Price said that he couldn't tell him. He said he would have to check with the company, that he did not have the authorization to tell him what the extra premium would be for his flying, that he would have to write and find out.

Q. Was anything else said at that time that you recall? A. No, there was not.

Q. When was a conversation next had with Mr. Price?

A. It was the first part of August. I would say the 5th or 6th. I went away on Sunday the first to my mother's.

Q. How long did you stay away?

A. I was gone until the afternoon of the 4th, which was a Wednesday.

Q. This took place the first week of August?

A. Yes.

Q. And who was present then?

A. My husband, Mr. Grant, myself and Mr. Price.

(Testimony of Margaret Kenny.)

Q. Where did the conversation take place?

A. At our home.

Q. Were you present during that entire conversation?

A. No, just the first part.

Q. During the time you were present, what was said?

A. Mr. Price walked in the front door—— [54]

Q. Pardon me. Were you present at the early part of the conversation?

A. The first part.

Q. The first part of the conversation. Go ahead, please.

A. They walked in and were standing in the doorway between the dining room and the hall, because I can see it just as plain. Mr. Price handed Peter a document.

Q. When you speak of Peter, to whom are you referring? A. My husband, Pete.

Q. Go ahead.

A. He handed him the document. I don't know what it was. It was a piece of paper, to read. I don't know whether it was a letter or what it was.

Q. What was said?

A. He said that the Company would insure him.

Q. Was anything else said at that time that you recall?

A. Peter asked him how much his aviation extra premium would be based upon the \$400.00 a year for the average man, and he said the company said around \$200.00.

(Testimony of Margaret Kenny.)

Q. That is with the extra aviation premium?

A. That is right.

Q. What else was said, if anything?

A. I went out. They were going into the living room and Pete, I remember asking him if he would figure up what he thought approximately it would be a month. He wanted some idea so that we could make up our mind whether we could [55] afford to take out the insurance or not.

Q. What was done then?

A. That I don't know. I went out. I left.

Q. That is the last that occurred?

A. Yes.

Q. Did your husband say anything at that time as to whether he would or would not take the insurance?

A. Well, I think the money was the big factor. We wanted to be sure we could afford to take it.

Q. At that point you left, is that correct?

A. That is right.

Q. What was your next contact with Mr. Price?

A. Mr. Price called me up and—or I called Mr. Price. I can't remember. To make a date, because Mr. Grant had decided he would take out the policy.

Mr. Walsh: I will ask that that be stricken as a conclusion.

The Court: Yes, it may be stricken.

Mr. Brauer: Q. Will you state the conversation between you and Mr. Price when he telephoned? A. All I know——

(Testimony of Margaret Kenny.)

Mr. Walsh: I object to that on the ground no foundation has been laid.

Mr. Brauer: Q. Did you testify you called Mr. Price or Mr. Price called you? I am sorry. I may not have heard [56] your answer to that question. I asked you what your next contact with Mr. Price was.

A. I said either Mr. Price called me or I called Mr. Price to make a date. I don't remember.

Q. When you say "called"——

A. On the telephone.

Q. What was said at that time?

A. Just to make an appointment to see Mr. Grant about taking out the insurance.

Mr. Walsh: I move that that be stricken as immaterial and having nothing to do with the issues in the case.

The Court: I do not think it is material. I will sustain the objection.

Mr. Brauer: Q. To come back for a minute, Mrs. Grant, to the conversation during the first week in August, you testified that Mr. Price showed a paper to your husband?

A. That is correct.

Q. Did you see that paper?

A. No, I did not.

Q. You did not read it?

A. No, I did not.

Q. You do not know what it said?

A. No, I do not.

(Testimony of Margaret Kenny.)

Q. After this telephone conversation that you talked about, when was the next time that you saw Mr. Price? [57]

A. Mr. Price came to our home on the evening of the 10th.

Q. The 10th of August?

A. That is right.

Q. Who was present then?

A. Just Mr. Price, my husband and myself.

Mr. Walsh: Will you please speak up?

The Witness: I am sorry.

Mr. Brauer: Q. Were you present during that entire conversation?

A. Yes, I was. Is that better?

Mr. Walsh: That is better. Thank you.

Mr. Brauer: Q. What was said at that time?

Mr. Walsh: I object on the ground no proper foundation has been laid.

The Court: She may answer.

Mr. Walsh: No time, place, or persons present.

The Court: I understood the time was fixed.

Mr. Walsh: The only thing was the time.

Mr. Brauer: Q. What time was it, if you recall?

A. I believe it was around 7:00 o'clock.

Q. In the evening? A. In the evening.

Q. And you have testified that Mr. Price and your husband were present?

A. That is right. [58]

Q. During that entire conversation. Now, what was said?

(Testimony of Margaret Kenny.)

A. Well, we went into the living room and Mr. Grant sat across from Mr. Price. He sat on the davenport, I sat to his left, and Mr. Grant sat on a chair across, and Mr. Price got up and handed Pete a paper—I don't know what it was—to read.

Q. What was the format of that paper? Did it look like a letter or what?

A. I thought it was a letter because he said he had gotten this back from the Company and that they would insure him for his business.

Q. Did he show one letter or more letters, if you recall?

A. That I don't know. Only one that I remember.

Q. You just remember seeing one letter being shown to you?

A. That is right.

Q. What else was said at that time?

A. Well, Mr. Price said that he would have to take down the information for the application for the insurance, and he asked him all the questions and Pete answered them and signed the application.

Q. What was done then?

A. Then Mr. Price got out his books and figured out what it would be. He had already figured it out previously, around what he thought it would be a month. He figured it out in his book and it came out to a little bit more than Pete had [59] figured it would be based on what he had said before. So he went over his books again and it was a little bit higher and it came out to \$53.36.

(Testimony of Margaret Kenny.)

Q. What was said in regard to that?

A. Mr. Price said that that was what the monthly payment would be.

Q. Please go on. What was done then?

A. Well, then Pete asked me if I would write him a check for the insurance, and I got out the check book, but we didn't have the balance in our check stub to warrant paying the payment.

Mr. Walsh: Pardon me. I am sorry I didn't hear that.

The Witness: I would have nothing in the balance on our check stub to pay for the payment, and I informed Pete about it, and we asked Mr. Price if he would hold the check one day until we went to Salinas and withdrew the money from the company and put it in the bank.

Q. What did he say to that?

A. Mr. Price said he would be glad to.

Mr. Walsh: Maybe we can stipulate to this. Do you want to stipulate?

Mr. Brauer: Yes, either a stipulation or testimony.

Mr. Walsh: I will stipulate that the bank balance of the Grants on August 10th was \$49.51, and that on August 11th \$490.00 was deposited in the account, that there was sufficient [60] money in the account to cover the check until the account was closed out on August 20, 1954.

Mr. Brauer: Which was after the death of Peter Grant.

(Testimony of Margaret Kenny.)

Mr. Walsh: Yes.

Mr. Brauer: You have no objection to these dates going in?

Mr. Walsh: Just so you wouldn't clutter up the record, that is all. If you want to put it in, I will withdraw the stipulation.

Mr. Brauer: I would like to put them in the record anyway, Your Honor.

Mr. Walsh: I will withdraw the stipulation then.

Mr. Brauer: Very well.

Q. I will show you what purports to be a booklet of check stubs and ask you whose it is.

The Court: I had not noticed the time. We will recess until 2 o'clock.

(Whereupon a recess was taken in these proceedings until 2:00 o'clock p.m. this date.)

Wednesday, June 19, 1957, 2:00 o'clock p.m.

The Court: You may return to the witness stand.

MARGARET KENNY

the plaintiff herein, resumed the stand, being previously duly sworn, testified further as follows:

Mr. Brauer: Your Honor please, if counsel will reinstate his stipulation, it won't be necessary to clutter up the record with these two documents.

Mr. Walsh: Very well.

The Court: The stipulation is reinstated.

Direct Examination—(Continued)

Mr. Brauer: Q. Now, Mrs. Kenny, as I recall

(Testimony of Margaret Kenny.)

it, the last thing you testified to was that you wrote a check in the sum of \$53.36 at the direction of your husband, is that right? A. Yes, I did.

Q. And who signed that check?

A. Mr. Grant did.

Q. What was done with that check then?

A. It was handed to Mr. Price.

Q. To whom was that check payable?

A. Metropolitan Life Insurance.

Q. On what bank was it drawn?

A. Bank of America in Watsonville.

Q. What was done with it then? [62]

A. Mr. Price handed Mr. Grant a receipt for the check.

Mr. Walsh: Pardon me, may I have that answer?

The Witness: A. I said Mr. Grant was handed the receipt for the insurance.

Mr. Brauer: Q. I show you Exhibit 2, in evidence, and ask you whether that is the receipt you are referring to? A. Yes, it is.

Q. That was handed to Mr. Grant by Mr. Price?

A. That is right.

Q. At the time he received the check?

A. Yes.

Q. Was anything said in that meeting with regard to a medical appointment?

A. Yes, Mr. Price told Mr. Grant that he would have to go to Dr. Blaisdale and have his physical examination.

(Testimony of Margaret Kenny.)

Q. What else was said?

A. But that he couldn't go on Thursday because that was Dr. Blaisdale's day off.

Q. Was anything said about the benefits that are payable under the application then taken in the event of death?

A. Well, Mr. Grant kidded with Mr. Price and said, "Well, what would happen if I should die the first year the policy is in force?" He said, "What would be the benefits paid to my family?" Mr. Price said, "Well, it would be \$100 a month for 20 years and at the end of 20 years your wife would get a [63] lump sum of \$10,000."

Q. Was anything said at that time as to when coverage was to be effective?

A. No, he didn't say either way.

Q. Was anything else said that you recall?

A. Not to my knowledge.

Q. Now, what was done with regard to the premium payment on the next day, August 11th?

A. We had told Mr. Price when we gave him the check that Mr. Grant would go to Salinas, to the home office, and draw out enough to cover the check and have it in the bank the next day, that we would have it in by 3:00 o'clock in the afternoon before the bank closed, and as soon as Mr. Grant was through flying he went to Salinas and obtained——

Q. (Interposing) What time approximately was it he went?

A. I would imagine just after 11:00 o'clock.

(Testimony of Margaret Kenny.)

The Court: That is already stipulated to.

Mr. Walsh: I ask it be stricken.

The Court: It is stipulated to.

The Witness: A. He went to Salinas and drew a check from our account.

Mr. Walsh: I ask that that be stricken as non-responsive to a question.

Mr. Brauer: Well, in the light of the stipulation I think we need not pursue this. [64]

Mr. Brauer: Q. Did you do anything with regard to a medical appointment for your husband?

A. Yes. On Thursday I had to take our son up, spent all day in the same building——

Q. Pardon me, I didn't hear you, I'm sorry.

A. On Thursday, which was the 12th, I had an appointment in the same building as Dr. Blaisdale for my oldest boy, and I was there all day, and while I was there I went to the desk and made an appointment for Mr. Grant for Friday. They couldn't take him until 3:30 that afternoon, which would be the 13th.

Q. Will you state what happened on August 13th?

A. Well, I got up in the morning and made his breakfast, and he left about 6:00 o'clock in the morning for work. And I usually went to bed, but I stayed up that morning and did my housework, and both the children were in bed; and at 8:30 in the morning Dr. Bell called from the hospital and just plainly stated that Pete had died.

And with that I collapsed. They came and took

(Testimony of Margaret Kenny.)

the children away and got sedatives from the doctor for me.

Mr. Brauer: (Handing document to Mr. Walsh.)

Mr. Walsh: I don't see any necessity of the death certificate. We will stipulate that, pursuant to request of counsel previously made, as of October 26th, of 1954 receipt of due proof of death under the previously existing policy was received by the company, and on the same day a claim was made by the [65] plaintiff, through her attorneys, for insurance under this application.

The Court: Is that sufficient?

Mr. Brauer: With regard to that stipulation I would ask if counsel would further stipulate that he nor anybody else on behalf of the defendant has ever made any objection to the manner or timeliness of the proof of claim.

Mr. Walsh: What is that again?

Mr. Brauer: That neither you nor anybody else on behalf of defendant has at any time made an objection as to the manner or the timeliness of the proof of loss and notice of death.

Mr. Walsh: Well, there is no issue as to that.

Mr. Brauer: No, no issue.

Mr. Walsh: I would say this, that there would be nothing in a policy, if issued upon the plan, the premium, the class of insurance applied for——

The Court: As I remember your answer, you denied that.

Mr. Walsh: Yes, it is denied, Your Honor.

(Testimony of Margaret Kenny.)

The Court: In your answer you deny that they made due proof.

Mr. Walsh: Well, I will stipulate, as I already have, that we received notice of their making a claim; and we stipulate to the date of death as August 13th, 1954.

And I think, counsel, so we may have the record clear, also stipulate that he was engaged in his occupation as a crop [66] duster at the time of his death.

Mr. Brauer: Your Honor please, I accept that stipulation. My purpose for wishing to introduce the certified copy of the death certificate, which is admissible under California law as prima facie evidence of all the facts therein recited, is primarily to show the cause of death.

The Court: Well, he has admitted the cause of death, as I understand it.

Mr. Brauer: As being an accident.

Mr. Walsh: That is not an issue here.

Mr. Brauer: All right.

Mr. Walsh: It would have been an issue if—well, that wouldn't have been an issue anyhow, even in the First Cause of Action. That is dismissed.

Mr. Brauer: I would still like to introduce it.

Mr. Walsh: All right, I will withdraw the stipulation.

The Court: You may introduce it.

Mr. Boyle: What stipulation are you withdrawing? The one of notice of due proof of loss?

(Testimony of Margaret Kenny.)

Mr. Walsh: I am trying to save the record.

Mr. Brauer: This has nothing to do, counsel, with question of proof of loss, the death certificate.

Mr. Walsh: Well, what is the point to the death certificate?

Mr. Brauer: Cause of death, basically, as being an [67] accident rather than sickness.

Mr. Walsh: That part of the death certificate is not admissible in evidence, whether it was accidental, suicide or homicide.

Mr. Brauer: I beg to differ with you, counsel. I have authorities to that effect. It is prima facie evidence, subject to being rebutted, but it is prima facie evidence as to all the facts therein recited.

Mr. Walsh: That is not correct. The statute of California, Health and Safety Code, Section 10155, says that a certified copy of death certificate is admissible in evidence as prima facie evidence of the facts stated therein; and in this state it has been held that that part of the death certificate which says whether or not the death was caused by accident, suicide or homicide not a fact because it's a conclusion by the coroner.

The Court: Oh, aren't we chasing shadows here? As I understand what he has agreed to stipulate, it is to save you the necessity of proving that on October 25th, 1954, the Metropolitan Life Insurance Company received a policy and due proof that the insured, Peter Grant, died on August 13th, 1954. He admits that. Do you have anything else you want to prove in regard to that?

(Testimony of Margaret Kenny.)

Mr. Brauer: No. I think no issue has been made as to suicide or——

Mr. Walsh: (Interposing) If he wants to go ahead and take [68] up the time of the Court proving things, I am not going to make any stipulation, Your Honor.

The Court: Well, I think that is all that is necessary.

Mr. Boyle: One more fact, that the death was accidental.

The Court: I guess there is no question about that.

Mr. Brauer: No issue has been made as to that, Your Honor.

The Court: Well, I understood that.

Mr. Walsh: In the absence of putting further evidence in the record which is the only evidence now before the Court, I will stipulate that on October 25th, 1954, the Metropolitan received a written claim for insurance under this application, along with due proof of death under policy number 20158526-A, which was the subject of the First Cause of Action which has been dismissed.

I don't think it's material whether death is accidental or by accidental means or suicide or homicide or anything else.

Mr. Brauer: All right.

The Court: Well, you say under the First Cause of Action. That is repeated in the Second and Third Cause of Action also.

Mr. Walsh: Not the first. The only matters be-

(Testimony of Margaret Kenny.)

fore the Court now, Your Honor, are the Second and Third Causes of Action.

The Court: Yes, I know, but that's a part of the allegations in the Second and Third Causes of Action also, as I understand it.

Mr. Brauer: As to accidental death? [69]

The Court: No, as to the proof having been made.

Mr. Brauer: Well, there is a stipulation to that effect.

Mr. Walsh: I am admitting that we received notice of the claim. I am not standing upon any defense that because claim was not made they are not entitled to bring this suit.

The Court: Then that should be sufficient.

Mr. Brauer: All right.

Mr. Brauer: Q. When did you next see Mr. Price, Mrs. Kenny?

A. I couldn't tell you the exact date, but Mr. Price came in the morning of the 14th, the day after Pete's death. I know it was early and the house was full of people, all the relatives and everybody was there, and I was under sedatives.

He came in with another man, but I don't know who he was. I don't remember, only that there was another man with him. And he asked me—he walked over to me and told me he was sorry to hear about Pete's death, and handed me a check. He said, "I never put it in the bank. I never deposited it." He said, "So the insurance is not in force."

He said, "Do you have the receipt?" Well, I

(Testimony of Margaret Kenny.)

didn't know where anything was. I told him I didn't know where it was, and he said, "Well, would you sign these papers?" And I said, "I don't want to sign anything."

He said, "Well, if you will sign these we will advance you money," and I said, "but I don't want to sign anything," and with that he left. [70]

Q. Mrs. Kenny, calling your attention to approximately June 8th, 1954, do you know whether or not that date your husband took a physical examination?

Mr. Walsh: What date was that?

Mr. Brauer: June 8th, approximately, 1954.

A. Yes, he did. He had to take a CAA physical.

Q. A what? A. A CAA.

Mr. Walsh: Just a moment. I think that is entirely irrelevant, Your Honor please, to any of the issues here. The question is, have we got a contract or haven't we.

Mr. Brauer: Your Honor, my reason for going into this line of testimony is, as I indicated in my opening statement, on reading the cases I am not completely sure that the insurability, the medical insurability of the applicant at the time of death is not relevant, and I wish to establish through this and other witnesses that he was in fact insurable in the event the Court concludes that it is a relevant matter.

Mr. Walsh: I am going to object to that, Your Honor, because that would open wide a long line of inquiry that could go on endlessly.

(Testimony of Margaret Kenny.)

The fact of the matter is, here the documents show the man did not have a physical examination that was required by the company, and if the purpose of this is an attempt on the part of the plaintiff to introduce evidence of other doctor's [71] opinions, in the first place it is entirely irrelevant and, in the second place, as I say, it would open an avenue of inquiry that might go on endlessly.

The Court: Well, I think anyone would presume he was in good health unless there is a showing to the contrary. I don't see any necessity of going into it, but this being a Court trial, however, if you feel it is material, I will let you present it and rule on its admissibility later.

Mr. Brauer: Thank you, Your Honor.

Mr. Brauer: Q. Do you know whether between June 8th, 1954, and the date of his death Peter Grant was ill?

A. Yes, he had complained of what we thought was the flu. He had a stomach ache, and flu was going around, and I called my doctor's nurse, which was Dr. Northrup, and she had a prescription filled at the drug store for him. It only lasted one day, and he took that medicine and that was that.

Q. Approximately when did that occur?

A. Oh, I think it was around the first part of July.

Q. Aside from that incident did, to the best of your knowledge, your husband ever visit any physician between June 8th, 1954 and the date of his death?

(Testimony of Margaret Kenny.)

Mr. Walsh: I think that is immaterial, Your Honor, for the same reason as stated before.

The Court: I will let him answer. Same ruling.

A. Not to my knowledge. [72]

Mr. Brauer: Do you know of your own knowledge whether or not your husband was in good health on August 10th, 1954?

A. Yes, he was.

Mr. Walsh: Pardon me, what was that question, Mr. Brauer?

Mr. Brauer: Q. Do you know of your own knowledge whether or not Peter Grant was in good health on August 10th, 1954?

A. Yes, he was.

Q. On August 11th? A. Yes.

Q. On August 12th? A. Yes.

Mr. Walsh: August 10th was——

Mr. Brauer: The first question, and then I asked as to August 11th.

Mr. Brauer: Q. What was the answer with regard to August 11th? A. Yes.

Q. On August 12th? A. Yes.

Q. On August 13th? A. Yes, he was.

Mr. Brauer: Pardon me a moment, Your Honor. That is all I have of this witness, Your Honor.

Your Honor please, I have a witness here who is a physician brought here from Watsonville. If it meets with the agreement [73] of Counsel and the Court, I would like to put him on at this time.

The Court: Well, I have always felt in a case

where there is a doctor in attendance we should permit him to testify so we can return him.

You may step down, and you may call your doctor.

(Witness excused.)

ANTONE J. SAMBUCK

called as a witness for the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

A. Antone James Sambuck.

Direct Examination

Mr. Brauer: What is your occupation, Dr. Sambuck? A. Physician and surgeon.

Q. Where do you practice?

A. I practice in Watsonville, practiced there from 1919 to 1923, and left Watsonville in 1923 and came back—was in Los Angeles and came back in 1934 and have been there since.

Q. Since 1934 in Watsonville, is that right?

A. Yes.

Q. Now, as part of your medical duties are you currently a medical examiner for the Civil Aeronautics Administration in Watsonville?

A. Yes. [74]

Q. Were you that during the year 1954?

A. Yes.

Q. Calling your attention to June 8th, 1954, did you on that date make a medical examination of Peter Grant on behalf of the Civil Aeronautics Ad-

(Testimony of Antone J. Sambuck.)

ministration? A. Yes, I did.

Q. And did you write down the results of that examination on a particular form? A. Yes.

Q. What form is that?

A. A Civil Aeronautics form.

Q. At what time did you make the notations on that form? A. At what time?

Q. Yes. When did you do it?

A. The date, you mean? The date or the time of day?

Q. Well, in relation to the time you examined Mr. Grant, when did you make these notations on that form?

A. 6/8/54, in the afternoon when he came to see me.

Q. In other words, at the time he was there to see you? A. Yes.

Mr. Walsh: June 8th, 1954? A. Yes, sir.

Mr. Brauer: Q. Will you describe generally, Doctor, what that examination consisted of?

A. Well, it consisted of a complete physical examination. [75]

Q. Now, as part of that examination did you have occasion to evaluate, to examine his head, face, neck and skull? A. Yes, sir.

Q. And nose? A. Yes, sir.

Q. Sinuses? A. Yes, sir.

Q. Mouth and throat? A. Yes, sir.

Q. Ears? A. Yes, sir.

Q. Eyes? A. Yes, sir.

Q. Lungs and chest? A. Yes, sir.

(Testimony of Antone J. Sambuck.)

Q. Heart? A. Yes, sir.

Q. Vascular system? A. Yes, sir.

Q. Abdomen and viscera? A. Yes.

Q. Anus and rectum? A. Yes.

Q. Endocrine system? A. Yes. [76]

Q. G.U. system? A. Yes.

Q. The extremities? A. Yes.

Q. The spine? A. Yes, sir.

Q. The skin? A. Yes, sir.

Q. Did you have occasion to give a neurological examination? A. Yes.

Q. And a psychiatric examination?

A. Yes, sir.

Q. Did you take his blood pressure?

A. Yes, sir.

Q. Did you determine what his weight was?

A. 224 pounds.

Q. Did you determine his height?

A. 73 inches.

Q. Doctor, at the moment I am merely asking you what you did rather than your specific findings.

A. Pardon me?

Q. I said, at the moment I am just asking you the extent of the examination rather than your specific findings. I am just asking you whether you took these measurements.

A. I see. Pardon me. [77]

Mr. Walsh: Pardon me, what did you say his height was? A. 73 inches.

Mr. Walsh: 73 inches? A. Yes.

(Testimony of Antone J. Sambuck.)

Mr. Brauer: Q. Now, did you have occasion to take a medical history?

A. During our examinations we always do. We ask questions if they had any serious illnesses, serious diseases, any surgery. We always do ask those questions.

Mr. Brauer: Can the Court hear the witness?

The Court: Yes, go ahead.

Mr. Brauer: Q. Now, you say that you always do. Did you in this instance take a medical history of Peter Grant? A. Yes.

Q. After making this examination, will you state what those findings were with regard to the health of Peter Grant at that time?

Mr. Walsh: Just a moment.

Mr. Brauer: Q. Based on your examination?

Mr. Walsh: I think that is immaterial, Your Honor, as to what the condition of his health was on June 8th, 1954.

The Court: I will make the same ruling I have made on the admission of other testimony. I will let it in and I will rule on its admissibility later.

Mr. Brauer: Q. You may answer the question.

A. I found him in good physical health.

Q. Did you note any deficiencies whatever in his physical condition?

A. None whatsoever.

Q. Did you after examining Peter Grant at that time issue to him a medical certificate for insurance? A. Yes, I did. [79]

(Testimony of Antone J. Sambuck.)

Mr. Walsh: I think that's immaterial as to how that was done.

The Court: You may have it marked, admitted with the same ruling.

Mr. Brauer: Let me ask the witness, is that your signature appearing on this document?

A. Yes.

Q. And did you give that to Peter Grant?

A. Yes, sir.

Mr. Brauer: I will offer this as Plaintiff's next in order.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Document received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Brauer: Q. Dr. Sambuck, are you presently a medical examiner for any life insurance company? A. I am.

Q. For which company?

A. Franklin and the Beneficial.

Q. And were you a medical examiner for life insurance companies around June, 1954?

A. I believe so.

Q. How long have you done work as a medical examiner for life insurance companies?

A. Well, I have been doing examinations for different insurance companies ever since I practiced medicine. [80]

Q. Now and as such, you have had occasion, have you not, to determine the medical acceptability of an applicant for life insurance. Now, based on your examination of Peter Grant, on June 8th, and

(Testimony of Antone J. Sambuck.)

on your experience as a life insurance medical examiner, do you have an opinion as to whether Peter Grant was, on June 8, 1954 a medically standard insurance risk? A. Yes.

Mr. Walsh: Just a moment, please. I ask that that answer be stricken, because the question is not involved here as to whether on June 8th of 1954 this man, this applicant would have been eligible, and furthermore, the hypothetical question does not take into consideration all the facts and issues in the case; and for the further reason that it is anticipating something that is not in evidence.

The Court: I will let him answer this question. Just yes or no.

A. Yes, sir, I do.

Mr. Brauer: Q. The question was merely whether you had an opinion.

The Court: That's right, let him answer.

A. Yes, sir.

Mr. Brauer: Q. Will you state your opinion?

A. In other words, if I had examined him for an insurance company, I would have passed him. I would have okayed him.

Mr. Brauer: Now, may I have Exhibit 1, please?

Q. Dr. Sambuck, I show you Exhibit 1 in evidence and call your attention to parts B and C thereof and ask you whether you, at my request, have, during the past few days, looked at an exact copy of that part B and C?

A. I didn't get your—

Mr. Walsh: Just a moment, please.

(Testimony of Antone J. Sambuck.)

Mr. Brauer: May I proceed, counsel?

Mr. Walsh: If Your Honor please, I would like to move to strike out the opinion this doctor has given upon the grounds stated. As I understand your ruling, it was he could state whether or not he had an opinion.

The Court: Yes, that's right.

Mr. Walsh: Now I ask that the opinion that he gave in response to the next question be stricken, because obviously it does not relate to the time of the application and was an answer to the question that calls for his conclusion, and did not include the facts involved in this case.

The Court: I will reserve my ruling on that until I take the full case.

Mr. Brauer: Q. In connection, Your Honor, with counsel's first point, namely, that this does not relate to the date involved here,—

The Court: I have already ruled on it.

Mr. Brauer: All right, Your Honor.

Q. Did you at my request during the last few days study an [82] exact copy of parts B and C of that Exhibit 1? A. Yes, sir, I did.

Q. Now, based on your examination of June 8th of Peter Grant, are you in a position to answer each question set forth on parts B and C of Exhibit 1, as of June 8, 1954?

A. Yes, I am.

Q. Now, based on your examination of June 8, 1954, if you were asked to fill out parts B and C, would you note anywhere thereon any medical in-

(Testimony of Antone J. Sambuck.)

formation inconsistent with Peter Grant's being a standard medical risk?

Mr. Walsh: Just a moment. I will object to that, because obviously any number of things may have happened between June 6th or 8th of 1954 and August 10th of 1954, and I don't think any honest witness, medical or otherwise, could testify or answer truthfully that question except by saying "No." Incompetent, irrelevant and immaterial.

Mr. Brauer: I think Your Honor understands my question. I asked only——

The Court: Just a moment.

Mr. Brauer: Excuse me, Your Honor.

The Court: I have my doubts about this, but I am going to admit it in evidence, and I will not be prejudiced by it in any way if I decided, as likely, not to consider it. You may answer.

Mr. Brauer: As counsel misunderstood the question, [83] perhaps the witness would too.

Mr. Brauer: Q. I am asking you as to whether as of June 8, 1954, you would note any derogatory information on parts B and C. A. No.

Q. What is your answer? A. No.

Mr. Walsh: I will object to that, Your Honor, because we are not concerned with June 8th; it is entirely irrelevant.

The Court: I will make the same ruling. I want to be somewhat liberal about letting some testimony in, and I feel that the objection should be sustained. I wouldn't consider it if this wasn't a court trial, but it is before the court anyway, and I will not be

(Testimony of Antone J. Sambuck.)

prejudiced by it if I decide the objection is well taken.

Mr. Brauer: Your Honor, my position——

The Court: You may answer.

Mr. Brauer: He has answered, Your Honor.

The Court: Let the answer stand.

Mr. Brauer: That is all I have of this witness, Your Honor. If I may, I would like to address the Court for a second as to the relevancy of this part.

The Court: I don't think there is any necessity of doing it, because I am going to hear from you later on in these matters. [84]

Mr. Brauer: Your Honor——

The Court: I wouldn't rule anything out without giving you an opportunity.

Mr. Brauer: Very well, Your Honor. Your witness, counsel.

The Court: You may cross examine, and any cross examination that you have in connection with matters that the Court has ruled on will be also stricken if I sustain the original objection.

Cross Examination

Mr. Walsh: Q. Doctor, when you examined Mr. Grant on June 8th, was it, of 1954? A. Yes.

Q. You said he weighed 224 pounds?

A. Yes, sir.

Q. And his height you said was 73 inches. I take it that would be six feet one inch, is that right?

The Court: Do you want a pencil and paper?

(Testimony of Antone J. Sambuck.)

A. 73 inches? Six feet three. No, six feet one, that's right.

Mr. Walsh: Q. His height was six feet one inch on June 8th? A. That's right.

Q. Was that with his clothes on, with his shoes on? A. That was with his shoes off.

Q. That was in his bare feet? A. Yes, sir.

Q. Six feet one inch. And when you weighed him, did he have [85] any clothes on?

A. He just had his underwear on, that's all.

Mr. Brauer: Sorry, I can't hear.

Mr. Walsh: Q. Just underwear?

A. Shorts.

Q. Shorts? A. Shorts and uppers.

Q. For all practical purposes, you would call that stripped weight, wouldn't you?

A. That's right.

Q. Did you see him after June 8th?

A. No, I haven't.

Q. Did you take a urinalysis?

A. Yes, sir.

Q. What other insurance companies did you say you were an examining physician for?

A. Franklin and Beneficial.

Q. In 1954? A. Franklin.

Q. What?

A. Franklin and Beneficial.

Q. Franklin what?

A. Franklin Life Insurance.

Q. Franklin Life Insurance Company?

A. Yes. [86]

(Testimony of Antone J. Sambuck.)

Q. And what's the other one?

A. Beneficial.

Q. Beneficial what?

A. Life Insurance Company.

Q. Do you know of your own knowledge what the weight requirements are for various classifications of the Metropolitan?

A. The Metropolitan? No.

Q. And you didn't know that in 1954?

A. No.

Q. So you could not tell in 1954, or now, could you, whether on account of weight and height, this man would qualify for insurance under the Metropolitan Life Insurance requirements?

A. I know nothing about Metropolitan life insurance requirements, no.

Q. You wouldn't know that? A. No.

Q. Now, there is a place in there, in part C of this Exhibit 1, where it says, "Height in shoes," is that correct? That's question No. 7 of part C.

A. Mmm-hmm, yes, sir.

Q. "Height in shoes." What does it say about weight there?

A. "Weight indoors, see instruction 5 above." I mean,—

Q. Does it ask there, Doctor, that the examining physician weigh the applicant? [87]

A. Yes, sir: "Did you weigh the applicant?"

Q. All right. Now, if you were the examining physician for the Metropolitan Life Insurance Company in 1954, you put in his height and his weight,

(Testimony of Antone J. Sambuck.)

you wouldn't know whether this application would be approved by the company, would you?

A. No, I wouldn't.

Mr. Walsh: That's all, Doctor.

Redirect Examination

Mr. Brauer: Q. Dr. Sambuck, will you take a look at your CAA examination form, please, and will you look at Item 55 and tell me what it says there?

A. "Build." Says "Heavy." I put down "Heavy."

Q. What other categories?

A. "Slender, medium, heavy, obese."

Q. Which one did you note as being applicable?

A. Heavy.

Q. Heavy. Do you recall how Peter Grant's weight was distributed?

A. It was well distributed; he was a muscular type. He was not an obese type.

Mr. Brauer: That's all.

Mr. Walsh: I move, if Your Honor please,—well, I will reserve that motion.

The Court: All right, the doctor will be excused?

Mr. Brauer: He may be as far as I am concerned. [88]

Mr. Walsh: Yes, certainly.

The Court: You are excused, then. The other witness may return to the stand.

(Witness excused.)

The Court: If you wish to, you may move up here while you are cross examining.

Mr. Walsh: Thank you. Are you through?

Mr. Boyle: Mr. Walsh, I wonder if you could speak a bit more clearly too? I can't hear you sometimes over here.

Mr. Walsh: I am sorry. I will try my best to talk up, and I hope the witness will too.

MARGARET KENNY

the plaintiff, recalled as a witness in her own behalf, having been previously duly sworn, testified as follows:

Cross Examination

Mr. Walsh: Q. Mrs. Kenny, is it now?

A. That's right.

Q. How soon after Peter Grant died did you leave Watsonville?

A. Mr. Grant died on August the 13th, 1954, and I lived there until March of 1956.

Q. And where did you move to then?

A. Davis, California.

Q. You have been living there ever since, have you? A. That's right.

Q. On November 20, 1956, you remarried? [89]

A. November 10th.

Q. November 10th? A. That's right.

Q. All right. November 10, 1956. You are happily married now? A. Very happily.

Q. During the conversation at your home at 111 Sudden Street in Watsonville on August 10th of 1954, there was no representation made to you by Mr. Price as to when any insurance would take

(Testimony of Margaret Kenny.)

effect pursuant to the application which is now in issue in this court, was there? A. No.

Q. As a matter of fact, Mr. Price never made any representation at any time that you know of as to when insurance would take effect pursuant to this application, is that correct?

A. No, we assumed.

Q. What's that?

A. I assumed that it was in effect when we paid the premium.

Q. Maybe I can refresh your recollection. Your deposition was taken on March 28, 1956, and I call your attention to page 80 and ask you to read lines 1 to 4, please.

A. I read the question and answer?

Q. Will you read it to yourself, please, and I will ask you a question.

The Court: Just read it to yourself.

Mr. Walsh: Q. Have you read it? [90]

A. Yes.

Q. Thank you. Reading from the deposition of Margaret L. Grant taken March 28, 1956, line 1 to 4, page 80:

"Q. There was no representation made at that time on August 10th by Mr. Price or at any other time as to when this insurance would become effective? "A. No."

Do you recall that question?

A. Yes, I do.

Q. And you recall giving that answer?

A. Yes, I do.

(Testimony of Margaret Kenny.)

Q. Is that your testimony now? A. Yes.

Q. On this same occasion, August 10th, did you hear Mr. Price tell Peter Grant that he had to have a medical examination for this insurance?

A. Yes, I did.

Q. And that he was to go and see Dr. Blaisdell, is that correct?

A. That's correct.

Q. And you yourself, I believe, testified that you went to Dr. Blaisdell's office and made an appointment for your husband to be examined for this insurance, and you made the appointment for him to see Dr. Blaisdell on August 13th of 1954 at 3:30 [91] p.m., is that correct?

A. That's correct.

Q. And you made that appointment on Thursday, the 12th of August?

A. That's correct.

Q. And before Peter Grant went to Dr. Blaisdell for the medical examination for this insurance, he died? A. That's correct.

Q. I believe that you testified that Mr. Price came out to your home at 111 Sudden Street in Watsonville about six times up to and including August 10th, is that correct?

A. That's correct.

Q. Do you recall that in your deposition you said that he came there five times up to and including August 10th of 1956?

A. Yes, I did, but I didn't know that he had

(Testimony of Margaret Kenny.)

been there at one previous time when I was not at home. You had letters that the——

Q. Pardon me? You don't know what?

A. There was one meeting between Mr. Price and Mr. Grant that I did not know about until two days ago. You had the letters on your desk at the deposition and I never saw them.

Q. Well, then, your recollection at the time your deposition was taken was, or your testimony in your deposition was, based upon your recollection, is that it?

A. Of the meetings that I attended, yes.

Q. Yes. And subsequently you have seen some correspondence, [92] is that correct?

A. That's right.

Q. And after reading that correspondence, that has refreshed your recollection, shall we say?

A. Yes.

Q. Now, what was this occasion that makes the sixth visit, and what was it that refreshed your recollection?

A. It was the fifth visit.

Q. Fifth?

A. The fourth visit, it must have been; because there was a letter that Mr. Price got back that I was shown.

Q. Is that the letter that you requested your attorneys to get a copy of from the Metropolitan Life Insurance Company before you filed this suit?

A. It is the application for a trial application, is the one I am speaking of.

(Testimony of Margaret Kenny.)

Q. What was the date of it?

A. I didn't pay any attention to it. It was in June, the end of June.

Q. It was a letter and you have read it?

A. I read the trial application, which was taken at that meeting, which I did not attend.

Q. And that fixes in your mind, then, another occasion that Mr. Grant called before August 10th?

A. In the end of June, yes. [93]

Q. The end of June? A. Yes.

Q. And that had something to do with a trial application, is that it?

A. That's what it said, yes.

Q. As a matter of fact, Mrs. Grant—Mrs. Kenny, pardon me—you didn't ever know that Mr. Grant had requested a trial application of the Metropolitan, did you? A. I did not.

Q. So this is knowledge you have acquired since this suit was filed? A. That's right.

Q. Now, that trial application—pardon me. I believe you testified that from the inception, that Mr. Grant wanted \$10,000 in insurance all the time, is that right? A. Yes, he did.

Q. However, the trial application was for \$5,000?

A. I know nothing about that.

Q. Well, will you identify that letter, then, so I can find out what it is you are talking about?

A. I am talking about the \$5,000 trial application that Mr. Grant made with Mr. Price. I don't know why he made it; the only conversations that

(Testimony of Margaret Kenny.)

I remember was that it was always \$10,000 that he wanted in insurance.

Q. I see. So there were some things that went on between Mr. [94] Grant and Mr. Price that you didn't know about that you have learned about subsequently? A. That's right.

Q. And it is true, isn't it, that there were conversations between Mr. Price and Mr. Grant that you did not know about? A. That's right.

Q. In fact, on one of the occasions of Mr. Price's visit to Mr. Grant, you were actually only there about ten minutes of the time, weren't you?

A. That's right.

Q. And you took a walk somewhere?

A. I went out of the house; I don't know where I went.

Q. And you didn't know where you went, and you didn't know whether or not you took the children with you; you didn't know whether you went to a neighbor's house and you didn't know much about anything of what you did, did you?

A. I just know that I was not there in the house.

Q. As a matter of fact, Mrs. Price,—pardon me—Mrs. Kenny—you did not understand much about these premiums or anything, did you?

A. I understood what the policy was Mr. Grant took out for the first year. I couldn't explain to you what the depreciation of the yearly family income was at all. I only know what Mr. Price told Mr. Grant on the 10th.

Q. All right. I will read from page 79 of the

(Testimony of Margaret Kenny.)

deposition, [95] your deposition, commencing at line 13.

"Mr. Walsh: Q. Actually you did not really understand much about this, did you?

"A. No, I didn't. It was just what I was told.

"Q. There was considerable discussion between Mr. Price and your husband that you did not understand——

"A. That's right.

"Q. ——what all this was about?

"A. That's right.

"Q. Base premiums, whole life premiums?

"A. That's right.

"Q. Family income and all that?

"A. That's right.

"Q. And all you know is that your husband asked you to write a check for \$53.36?

"A. That's right.

"Q. And you did? "A. That's right.

"Q. You gave it to him? "A. Uh-uh."

You recall the question?

A. Yes, I do, yes.

Q. And the answers? A. Yes. [96]

Q. Now, I believe you said that the next time you saw Mr. Price after August 10th was on August 14th, was it?

A. Yes, in the morning.

Q. What's that? A. Yes.

Q. On August 14th, the day after Mr. Grant passed away. And Mr. Price came there and offered his condolences, did he not? A. Yes.

Q. And he asked you, he gave you back the

(Testimony of Margaret Kenny.)

check, didn't he? A. Yes, he did.

Q. And you accepted the check?

A. Yes, I did.

Q. And he asked you for a receipt?

A. He asked me for his receipt, yes.

Q. Now, at the time your deposition was taken, you were very positive that he did not ask for the receipt. You recall that, don't you?

A. Yes, I recall it.

Q. Now, you took back the check. What did you do with the check?

A. Well, I was so under sedatives and so upset, that I don't remember. I handed it to somebody; I don't know who it was.

Q. Did you ever send the check back to anybody connected with the Metropolitan Life Insurance Company? A. No, I didn't. [97]

Q. Did you ever since then instruct your attorneys to make any tender of any amount of money to the Metropolitan Insurance Company on account of this application for insurance?

A. No, I have not.

Mr. Walsh: Can it be stipulated, counsel, that no tender has ever been made of any amount of money since then to the Metropolitan on account of the premium on this application?

Mr. Brauer: Subsequent to death.

Mr. Boyle: So stipulated.

Mr. Brauer: Subsequent to death.

The Court: You stipulated to it; I don't think it makes any difference.

(Testimony of Margaret Kenny.)

Mr. Walsh: Q. Now, did I understand you to say that Mr. Price first called at your home in Watsonville early in June of 1954? A. Yes.

Q. How close can you fix the date?

A. Well, it was soon after I moved there and we moved there just about two weeks before school was out.

Q. Well, in your deposition now, Mrs. Kenny, you said that it was the latter part of June when Mr. Price first called there. What's happened that changed your mind?

A. I made a mistake. I thought it over. It would have had to have been the first part of June.

Q. So now it is your recollection it was the early part of [98] June?

A. It would have had to be, yes. It had to be. We moved there two weeks before school was out.

Q. You are positive now it was the early part of June? A. Yes, I am.

Q. Was it the first week in June?

A. Yes, I think so.

Q. You think it was the first week in June of 1954? The 1954 calendar shows that June 1st was on a Tuesday. Would you say that it was some time, then, before the 5th of June, which was a Saturday?

A. I couldn't say. I can't remember.

Q. But it was in the first week of June?

A. I think it was, yes.

Q. All right. Well, now, I want something more than what you think. I want a definite answer from you, Mrs. Kenny, because of the conflict in your

(Testimony of Margaret Kenny.)

testimony in your deposition and now. I would like to know whether it was the first week of June or the last week of June. You have had months to reflect upon this, so I think that we should have a definite answer.

Mr. Boyle: Your Honor, the question has been asked and answered. Why should the witness be harassed?

The Court: Yes, she has answered it. She says she thinks it was the first week of June. And going back that far, I would hate to try to give a definite answer—— [99]

Mr. Walsh: Q. All right, that's after reflection since this deposition was taken in March, on March 28th of 1956? A. That's right.

Q. And having reflected all during that time, you now say that he called the first week in June?

A. That's right.

Q. All right. And when was the second time he called? A. A few days later.

Q. A few days later. Did I understand you correctly to say that Peter Grant was not present on either of those two occasions? A. No.

Q. The third visit, was Peter Grant present?

A. That's right.

Q. What date was that?

A. I don't know the exact date. It was toward the end of June. It is very hard to know the exact date when something happened three years ago, even a year and a half.

The Court: Take a recess for fifteen minutes.

(Testimony of Margaret Kenny.)

(Recess.) [100]

Cross Examination

Mr. Walsh: Q. Mrs. Kenny, you said that Mr. Grant's occupation at the time in 1954 was as a crop duster.

A. That is correct.

Q. And he worked for the Atwood Company whose home office was in Salinas?

A. That is correct.

Q. And a moment ago you mentioned something about his going to the home office to collect some money and deposit it in the bank.

A. Yes, that is correct.

Q. You mean at the home office of Atwood?

A. Yes, in Salinas.

Q. Not the Metropolitan?

A. No, I meant the Atwood organization.

Q. Down around Watsonville they raise a lot of strawberries, don't they?

A. Yes.

Q. Lot of strawberry fields?

A. Yes.

Q. And on the morning of August 13th he was dusting a strawberry field, wasn't he?

A. That is what I was told.

Mr. Walsh: I think we can stipulate to that, Counsel, that [101] in his occupation in dusting strawberry fields he had to fly very low and hop over hedges and fences and trees?

Mr. Boyle: I can't with that simplicity describe the operation, Mr. Walsh. I would like to accommodate you on the stipulation, but shall we say this, that in dusting, fertilizing or fumigating crops the

(Testimony of Margaret Kenny.)

height at which the airplane flies is necessarily less than you will fly for pleasure or on a commercial line.

Mr. Walsh: Well, obviously. But you don't know very much about it, do you?

Mr. Boyle: I can say that at 6:00 o'clock every Sunday morning I am awakened by a crop duster that flies over my house dusting the fields just opposite.

Mr. Walsh: Q. Well, you can tell us, Mrs. Kenny, in Peter Grant's occupation he had to fly his airplane close to the ground?

A. Yes, he did.

Q. And he dusted things like strawberry patches and orchards and things of that sort?

A. That is right.

Q. And since there is no objection to the hearsay, you were told that he was doing that, dusting some strawberry patches, that morning of August 13th?

A. The reason I am not too sure of it, Mr. Walsh, is because he did different jobs the same mornings. I was told that he [102] was dusting a strawberry field when he had his accident, yes. It isn't just strawberries that he dusts.

Q. Now, do you know at what point during these various negotiations that were going on between Mr. Price and Mr. Grant, when Mr. Grant decided that he wanted \$10,000 of insurance instead of \$5,000?

A. Well, to my knowledge Mr. Grant wanted

(Testimony of Margaret Kenny.)

\$10,000 insurance before we ever met Mr. Price. He had talked about it.

Q. You yourself were not particularly interested in his taking out additional insurance, were you?

A. I didn't think we could afford it.

Q. The question was, you yourself were not particularly interested in his taking out additional insurance? A. Not as much as he was, no.

Q. Well, I will call your attention to your deposition, page 23, line 21. The question was, "Were you interested in having your husband get more insurance? A. No." Do you recall that?

A. Yes, I do.

The Court: I never knew a wife who was interested in her husband getting insurance.

Mr. Walsh: Pardon me, Your Honor?

The Court: I say I never did know a woman who was interested in having her husband get insurance.

Mr. Walsh: Some of them are very much interested, Your Honor. [103]

The Court: Well, I never knew one.

Mr. Walsh: And some women are interested in having insurance, too.

The Court: I know, but that is when they are figuring on poisoning them or something.

Mr. Walsh: Now, when Mr. Grant was working at crop dusting, did he leave home early in the morning? A. Yes, he would.

Q. And he would get home about 11:00 o'clock?

A. As a general rule, yes.

(Testimony of Margaret Kenny.)

Q. And then would stay home for a while?

A. Yes. He usually went to bed.

Q. Well, as I recall your testimony, you said he usually got home about 11:00 o'clock and stayed home until about 2:00 o'clock, and then he would go out somewhere and make arrangements for the next day's flying.

A. That is correct.

Q. And I think you also said that often times when he was home, say between 11:00 a.m. and 2:00 p.m., that you would be out shopping.

A. That was my only chance.

Q. I see. And he would stay home and take care of the children?

A. It wasn't the children so much as the phone. Somebody had to be at the phone. That was our business, Mr. Walsh. [104]

Q. What?

A. We ran the business in Watsonville for Atwood Crop Dusters.

Q. Now, the fifth time that Mr. Price came there, you said that was the first part of August, probably the 5th or 6th.

A. That is correct.

Q. And he showed Mr. Grant a letter or something?

A. I saw him with a piece of paper.

Q. You saw him with a piece of paper?

A. Yes.

Q. You don't know what it was?

A. I never read it.

Q. Do you recall about the middle of July Mr.

(Testimony of Margaret Kenny.)

Price coming out there and showing Mr. Grant some papers?

A. Not in the middle of July, no. No.

Q. And August 10th, that was in the evening, wasn't it? A. That is correct.

Q. Mr. Price had some other papers with him?

A. Yes, he did.

Q. Was there a letter or anything among those papers?

A. I don't know, Mr. Walsh. I didn't read them.

Q. The conversation at various times that Mr. Price was there went on between Mr. Price and Mr. Grant? A. That is correct.

Q. You didn't participate in the conversations?

A. No. [105]

Q. And you recall, do you, hearing Mr. Price saying to Mr. Grant that he would have to get information from the company before he could even determine whether or not the company would consider insuring Mr. Grant?

A. Yes, he did.

Mr. Boyle: One moment, Your Honor. May we have the time and place fixed in respect of this incident?

The Court: I know what it was. She has already testified to the matter. Go ahead, though. I think I know what it was. I think I heard it talked about before.

Mr. Walsh: Now, do you recall Mr. Price saying that on more than one occasion?

A. No, I do not.

(Testimony of Margaret Kenny.)

Mr. Walsh: That is all at this time, Your Honor.

The Court: Just to clear the matter up in counsel's mind, that was prior to the time when you gave the check?

A. That was two meetings back, yes.

The Court: Yes. That was what disturbed me, but I know what it was.

Mr. Boyle: It is in the record.

The Court: All right, it's in the record.

Mr. Walsh: Q. That one occasion you say? You only heard him say that on one occasion?

A. That is correct.

Q. And that was two meetings before August 10th? [106]

A. That was in the middle of July when he took the information about his crop dusting.

Q. I show you Plaintiff's Exhibit 5, which is the so-called AER 6 Form, which shows the date of July 14th. Is that the one?

A. Yes, that is it, Mr. Walsh.

Mr. Walsh: Thank you. I have no further questions at this time. I would ask that the witness remain. I may want to call her later.

The Court: You can step down. Oh, excuse me. Wait a minute.

Redirect Examination

Mr. Brauer: Q. On August 10th, 1954, Mrs. Kenny—— A. Yes?

(Testimony of Margaret Kenny.)

Q. —you were present the entire time that Mr. Price was there, is that right?

A. Yes, I was.

Q. And you were within hearing distance of the entire conversation, were you not?

A. As I said before, I was, when Mr. Price was there—we had a very small living room, and Mr. Grant sat across from me, which was kitty-corner from Mr. Price.

Q. And as to the conversation which took place on August 10th, 1954, it was as you have testified on direct examination? A. That is right.

Mr. Brauer: Nothing further. [107]

Mr. Walsh: One further question, or a couple of them.

Recross Examination

Mr. Walsh: Q. At that time, isn't it true that when Mr. Price called there, that your children were eating dinner?

A. That is possible. I don't quite remember. It was around dinner time.

Q. And you had a separate dining room, that is, a dining room separate from the living room, didn't you?

A. Well, Mr. Walsh, they wouldn't have been eating in the living room.

Q. Were they eating in the dining room?

A. No, they would have had to been in the kitchen.

Q. It is quite possible that during that time you

(Testimony of Margaret Kenny.)

got up and went in to help the children or do something?

A. That is possible. Any mother would.

Q. So it is quite possible that you were not present during the entire conversation on the evening of August 10th, is it not?

A. It was very little. I was there most of the time. If I got up with the children, I can't remember whether I did or not.

Q. But that is possible.

A. That is possible, yes.

Mr. Walsh: Thank you, that is all.

Mr. Brauer: That is all, Mrs. Kenny.

(Witness excused.) [108]

The Court: Call your next witness.

Mr. Boyle: Plaintiff will rest, Your Honor.

Thereupon, the Plaintiff rested its case in chief.

Mr. Walsh: I should like to move, Your Honor, that the testimony of this doctor—what was his name?—Sambuck as to his opinion concerning whether or not he would have approved—I think he gave an opinion that he would have approved this man as a standard risk for life insurance. I move that that testimony as to his opinion be stricken.

The Court: The motion will be denied at this time, without prejudice to the Court passing on it in the final determination of the case.

Mr. Walsh: Very well, your Honor.

I would like to make a motion at this time to

dismiss the complaint upon the ground that the plaintiff has not proved a case of a contract.

The evidence shows that the application which was submitted called for a medical examination. The applicant full well knew he had to have a medical examination, and his wife knew it also; and she even went and made the appointment with the examining physician; that the application was never completed.

The written document upon which the plaintiff relies, in addition to the ones pleaded in the complaint, require several things, among which is a medical examination. Obviously, no application for insurance can even be entertained until there [109] is a medical examination.

The application itself, which the applicant signed, says that, "if an amount equal to the full first premium on the policy applied for is paid to and accepted by the company at the time part A of this application is signed, and if this application"—being the whole application—"is approved at the Company's Home Office for the class, plan and amount of insurance herein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from the date hereof."

The receipt was given, the application itself, recite that the \$53.36 was paid on account. At this point, of course, the evidence, as I understand Mrs. Kenny's testimony is that she was informed that that was the full first premium.

But let us pass on to the other conditions.

I think it is so apparent that it needs hardly any

mention that there had to be a medical examination. There had to be questions asked by the examining physician of the applicant, recorded on part b of the application, certified to and signed by the applicant with the signature of the doctor as a witness.

This shows that that was never completed, and of course the undisputed testimony in the case shows that he never had a medical examination.

Now, with respect to the law on that subject, counsel for the plaintiff has submitted to Your Honor a trial brief in which [110] they rely upon the California Supreme Court case of Ransom vs. the Penn Mutual Life Insurance Company, and they say that that is the authority upon which they rely.

I should like to point out that that case differs completely from this one in that, first of all, the holding of that case was that under those particular circumstances and the particular language of the application of the policy—particular application, after it had been completed, including the medical, and received by the company at its home office, then a contract of insurance came into effect. Because of the particular language in the application. There was no receipt involved in that. Because of the particular language of that application, they held that whether or not the applicant was insurable medically was a condition subsequent. [111]

Now in that case, the applicant was examined by the examining physician, the full first premium was paid, those papers were received by the Com-

pany at the home office and the underwriting department wrote for more medical information. And before it was received, the applicant died. Now, all that case held was that the additional medical information on that aspect of the case, the additional medical information that they received, was not such as would vitiate the policy. In other words, that the applicant had not, in the medical part, Part B of the application, concealed from the Company anything material to the risk so far as his medical history was concerned. But on the question of contract, that case said there was a contract only when the completed application, including the medical and the full first premium, were received by the Company at its home office. And there is no case cited by the decision in that Ransom case that holds that you can have a contract of insurance without a medical examination where a medical examination is required. So there is no holding in California on this precise point. The Ransom case is not this situation.

Now, we have a statute in California that covers this subject, Insurance Code Section 10,115, which says:

“When a payment is made equal to the full first premium at the time an application for life insurance other than group life insurance is signed by the [112] applicant, and either the applicant received at that time a receipt for said payment on the form prepared by the insurer, or in the absence of such a receipt, the insurer receives the said payment at its home office, branch office, or the office of

one of its general agencies, and in either case the insurer, pursuant to its regular underwriting practices and standards, approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for, and the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date especially requested in the application for the policy to take effect, whichever is later, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant."

Now, the Ransom case, the application—And incidentally, although counsel in their trial brief mentioned that as a case being decided on a receipt, there is nowhere any mention of a receipt in the Supreme Court decision. What the Court decided upon was the construction of the clause in the [113] application, and that clause read this way:

"If the first premium is paid in full in exchange for the attached receipt signed by the Company's agent when this application was signed, the insurance shall be in force from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the proposed insured was at that date acceptable."

Now, I can understand how the Court could say

that the satisfaction of the Company is a condition subsequent, and therefore it's up to the Company to prove that he was not insurable by reason of the medical information they had. But what the Court held, the Supreme Court of California, in that case so far as the contract is concerned, and there was no dispute there about the payment of the full first premium, there was a full first premium; the court said: "We are of the view that a contract arose upon defendant's receipt of the completed application and the first premium payment." That's all that the Ransom case holds so far as the contract is concerned.

Here we have an incomplete application. Under the law, an application by an applicant to an insurance company is an offer, and upon the acceptance and approval, you have a contract, providing there is a meeting of the minds. In other words, if it is approved for the plan, class and amount. [114]

Now, we have to look long and hard to find a case that is similar to this one, and I think the reason is obvious, that ordinarily people don't bring a suit when they haven't even made an offer. But we find a case where the application, the language of the application and the language of the receipt, were identical with this one, the case of Hyder against Metropolitan Life Insurance Company, a South Carolina case, 190 Southeastern 239. In that case they distinguish between the language set forth in the application of the Metropolitan and the language set forth in the receipt of the Metropolitan, with that issued by the Equitable Life Assur-

ance Society, which was almost exactly like the language in the Ransom against Penn Mutual. And they held where no medical examination was had, there was no contract of insurance.

Now, in the Federal Courts, there is a case that is quite close to this, although the language of the application and the receipt, we would say, were more favorable to the plaintiff than here. But nevertheless, the Court said—pardon me a moment, Your Honor; I seem to have misplaced it.

The case of Corn against United American Life Insurance Company, decided in the United States District Court in Colorado in 1952, reported in 104 Fed. Sup. 612. There was a case where the full first premium was paid, but the insured died before he had had the medical examination. The Court held that the plaintiff could not recover, and the Court said: [115]

“Diligent search has failed to reveal a single authority which recognizes the existence of interim insurance where the alleged insured himself had failed to take steps upon which the agreement of the parties conditioned liability.”

Now, Your Honor, there was no condition so far as the medical feature of this application was concerned to be performed by the defendant in this case that wasn't performed. It was up to the applicant to perform a condition precedent to even the completion of the application, namely, to submit himself and have a medical examination, and to give a medical history to the examining physician, and to certify to the correctness of that medical his-

tory. That was not done; unfortunately, the applicant died before his appointment with the examining physician. The applicant's wife herself made the appointment. The applicant did not keep the appointment. There was a condition to be performed by him that was not performed. Therefore, Your Honor, on the fundamental principles of contract and common sense and good reason, there should be no contract of insurance here, and I think that now is the time to determine that, rather than put this defendant to the further trouble and expense of having to defend on this case where, as I say, there was never even an offer made for insurance.

So I ask that this complaint as to the second and third [116] causes of action be dismissed.

The Court: I may have to hold with you on the technical questions that you have raised here from a strictly technical standpoint. This may be a case that can't be decided on justice, but might have to be decided on the law. I realize that we have a great many cases in this day that have to be decided on the technicalities of the law instead of deciding on justice, and I may have to finally agree with you. But from all standpoints of justice and right, this woman is entitled to this money, and for the present I am going to overrule your objection and take the matter up when I render my final decision after the case has been submitted to me. So the motion at this time will be denied without prejudice to the Court reconsidering the question that you have raised at a later time.

Mr. Walsh: Very well. Mr. Price, will you step forward?

The Court: I see it is five minutes to 4:00. Do you think we better adjourn until 10:00 o'clock tomorrow morning?

Mr. Walsh: That is agreeable with me, Your Honor.

The Court: Agreeable with you?

Mr. Boyle: Thank you, Your Honor.

The Court: Adjourn until 10:00 o'clock tomorrow morning.

(Whereupon a recess was taken until 10:00 o'clock tomorrow morning, Thursday, June 20, 1957.) [117]

Thursday, June 20, 1957—10:00 o'clock a.m.

The Clerk: Margaret L. Grant versus Metropolitan Life Insurance Company, on trial.

Mr. Walsh: I should like to call Mrs. Kenny as an adverse witness.

The Court: Yes, you may.

MARGARET L. KENNY

was recalled as an adverse witness by the defendant, and having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Mr. Walsh: Q. Mrs. Kenny, I don't believe you have told us where you reside.

A. At present?

Q. At present. What is your address?

(Testimony of Margaret L. Kenny.)

A. I have two addresses. My house number is 521 Seventh Street. My mailing address is 187—

Q. Will you speak up a little?

A. My house number is 521 Seventh Street in Davis.

Q. You live in the City of Davis?

A. Yes, we do.

Q. Now, you mentioned yesterday that you read a trial application. [119]

A. That is correct.

Mr. Boyle: Pardon me.

Your Honor, that is not my recollection.

Mr. Walsh: I have the transcript of yesterday's testimony, at page 93, line 21 (reading):

"I read the trial application, which was taken at that meeting, which I did not attend."

Q. That meeting you refer to was the fourth visit Mr. Price made; do you recall that, now?

A. Yes.

Q. And that was about when?

A. Well, according to the application, it was the end of June.

Q. How do you identify that as the trial application?

A. That is what the application said, that they showed me.

Mr. Walsh: May I have Exhibit No. 1, please?

Q. I show you Plaintiff's Exhibit 1. Did it look anything like that?

A. That was not the paper.

Q. Did it look anything like that? Will you

(Testimony of Margaret L. Kenny.)

examine it, please? A. That I can't tell.

Q. Was it in that form?

A. It wasn't the two papers that I saw. It said at the top, "Trial Application." [120]

Q. You say it wasn't two papers?

A. I was shown one sheet of paper, a photo-static copy. It said "Trial Application" at the head of it.

Q. When did you read that trial application?

A. Two days before court.

Q. Oh.

A. I wasn't shown it. You have it.

Q. Did it say "Trial Application" on it?

A. Yes.

Mr. Walsh: Counsel, do you have that?

Mr. Boyle: Yes, sir. Yes, I have the letter that was shown to Mrs. Kenny.

Mr. Walsh: This is not an application. You are showing me a letter dated June 28, 1954, from Mr. Wigham to the Metropolitan Life Insurance Company.

Mr. Boyle: That is what the witness is referring to, what I think she might have in mind.

Mr. Walsh: Q. I show you what your attorney has just handed me, a photostat of a letter of June 28, 1954, from Mr. Alan C. Wigham to the Metropolitan Life Insurance Company. I will show that to you. Is that the document to which you are referring? A. Yes, it is.

Q. And you saw this just two days before the trial started? A. That is correct. [121]

(Testimony of Margaret L. Kenny.)

Mr. Walsh: Will it be stipulated, Counsel, that I furnished you with this photostat several months ago?

Mr. Boyle: So stipulated. Do you wish to offer it, Mr. Walsh?

Mr. Walsh: No, I am going to put the original in later.

That is all, Mrs. Kenny, thank you.

(Witness excused.)

Mr. Walsh: Mr. Wigham, will you come forward, please?

ALAN C. WIGHAM

called as a witness on behalf of the defendant, being first duly sworn, testified as follows: .

The Clerk: Q. Please state your name and occupation for the record.

A. Alan Wigham.

The Reporter. Q. Will you please spell your last name?

A. W-i-g-h-a-m; A-l-a-n is the first name.

I am presently on disability with the Metropolitan Life Insurance Company.

Direct Examination

Mr. Walsh: Q. Mr. Wigham, in response to my questions, will you speak up clearly so counsel sitting way over here can hear you?

A. Yes, I will, sir.

Q. Your full name is Alan C. Wigham? [122]

A. That is right.

(Testimony of Alan C. Wigham.)

Q. Where do you reside, Mr. Wigham?

A. 1524 Salinas Highway, Monterey.

Q. What is your present occupation?

A. Presently I am on disability with the Metropolitan Life.

Q. You are not actively engaged as an employee of the Metropolitan Life Insurance Company?

A. Not at this time, no.

Q. In 1954 were you an employee of the Metropolitan? A. Yes.

Q. In what capacity?

A. As manager of the Monterey District Office.

Q. How long have you been manager of that office? A. A little over 14 years.

Q. All told? A. Yes.

Q. Is that what is called a district office?

A. Yes, it is called the district office.

Q. Do you know, and did you know then, Mr. George I. Price? A. Oh, yes, yes.

Q. Was he an employee of the Metropolitan?

A. Yes.

Q. What was his—in what capacity was he employed by the Metropolitan in 1954?

A. As an agent in the Watsonville area. [123]

Q. What is that?

A. As an agent in the Watsonville area.

Q. What kind of an agent?

A. Well, he was collecting agent and soliciting new insurance.

Q. What is that?

(Testimony of Alan C. Wigham.)

A. Collecting premiums and soliciting new insurance.

Q. He was a soliciting agent, is that what it is called? A. That is right.

Q. Did the company have any general agency in that area?

A. No, the company does not have general agencies.

Q. Was Mr. Price in your district?

A. Yes. Detached. He worked out of the Monterey District Office as a detached agent.

Q. He was what is called a detached agent?

A. That is right.

Q. And he worked under your supervision and control? A. That is true.

Q. Business that was handled by Mr. Price came through your district office, did it?

A. Yes, business was handled through our district office in all phases, except that insurance requiring medical examinations, when it was prepared for the examination it went directly to the doctor in the local area.

Q. Now, can you tell me, Mr. Wigham, whether or not a soliciting agent of the Metropolitan such as Mr. Price in 1954 [124] had any authority to enter into any contract of insurance?

Mr. Boyle: Objection, Your Honor,—

Mr. Walsh: Let me finish the question, please.

Mr. Boyle: I am sorry.

Mr. Walsh: Q. (continuing) —have any authority to enter into any contract of insurance on

(Testimony of Alan C. Wigham.)

behalf of the Metropolitan Life Insurance Company? A. No, none whatsoever.

Mr. Boyle: Objection, Your Honor. We move to strike the answer.

The Court: It may be stricken.

Mr. Boyle: Incompetent, irrelevant, immaterial.

The Court: I will reinstate the answer subject to your objection.

Mr. Boyle: May I also add to my objection it isn't shown here there was any such limitation was shown to either Peter Grant or his wife?

The Court: I will let the answer stand and rule on its admissibility later.

Mr. Walsh: Q. Mr. Wigham, did you, as manager of the Monterey District Office, have any authority to enter into any contract of life insurance on behalf of the Metropolitan Life Insurance Company? A. No, none whatsoever.

Mr. Boyle: Same objection, Your Honor. [125]

The Court: Yes. The objection may go in ahead of the answer.

Mr. Boyle: May we also at this time state the further objection that it violates the parol evidence rule and the extrinsic evidence rule? The same goes as a basis for the motion to strike.

Mr. Walsh: Your Honor, please, all the way through counsel has made a point of this matter of authority of the agent, has requested Your Honor to receive evidence, which Your Honor has received; on the question of authority.

(Testimony of Alan C. Wigham.)

Now, we have here a man who is well qualified to testify on that point.

The Court: I will hear you on that question later. At present I will overrule the objection without prejudice to striking the answer later if I find it is not admissible in the opinion of the Court.

Mr. Walsh: Thank you, Your Honor.

Q. I will show you Plaintiff's Exhibit 1, Mr. Wigham, which is an application Form 036-K-9.

A. Yes.

Q. Is that the form of application that in 1954 was customarily used by the company?

A. Yes.

Q. Can you tell me what is required in order to complete such an application? [126]

Mr. Boyle: Objection, Your Honor, on the same ground previously stated to this evidence, and on the further grounds that it calls for a conclusion of the witness.

The Court: Yes, I think it does. The objection will be sustained.

Mr. Walsh: Well, if Your Honor please, that goes to the very essence of this issue.

The Court: If you feel that way about it I will reserve ruling on it and let him answer.

Mr. Walsh: I think it is very relevant.

The Court: It may be. If you think so, I will let it go into the record, with the understanding that I am doing so subject to striking it later if I find it is not material.

Mr. Walsh: Then the witness may answer?

(Testimony of Alan C. Wigham.)

The Court: Yes, he may answer.

Mr. Walsh: Q. The question was, Mr. Wigham, what is necessary to complete such an application for insurance? I don't mean to go into all the details. Briefly, Part A has to be completed, does it not?

A. Well, the writing agent completes Part A, of course, answering all these questions carefully. And in an application like this the next requirement is a medical examination, and at the same time, when he completes this he does what is known as the mercantile report; then he is supposed to put it in the doctor's hands for an examination—medical [127] examination.

Q. Now, would that medical examination, the results of it, be recorded in Parts B and C of this application? A. That is right.

Q. And would the detached agent such as Mr. Price, if Part A of the application is signed—and that requires it be signed by the applicant, does it not? A. Yes.

Q. Then after Part A is signed by the applicant what would the agent do with the application?

Mr. Boyle: Objected to, Your Honor.

The Court: Same ruling.

Mr. Boyle: Same objection.

The Court: Same ruling.

A. He is supposed to put it in the doctor's hands, or he does put it in the doctor's hands. Sometimes he makes the appointment, sometimes he leaves it to the applicant to phone the doctor to

(Testimony of Alan C. Wigham.)

make an appointment, so that there will be no delay when the applicant calls at the doctor's office.

Mr. Walsh: Q. And then after the doctor—is the doctor required to have the applicant appear before him and answer certain questions as to his medical history? A. Yes.

Mr. Boyle: Just a moment.

The Court: Just a moment. [128]

Mr. Boyle: We will object to this evidence as incompetent, irrelevant and immaterial. It is an attempt to limit the scope of agency, and there is no showing here of any limitation in the scope of the agency which was called to the knowledge of Peter Grant or his wife.

It is a violation of the parol evidence rule and the extrinsic evidence rule.

Now, Your Honor, may I suggest—I take it that all of this evidence will be of like character. I don't like to interfere with the examination. Possibly if Mr. Walsh is agreeable, we can stipulate that my objection will go to all of this evidence, and it will be subject to a motion to strike on all the grounds stated. Then possibly he can proceed uninterrupted by me.

The Court: Yes. I might say, my first thought in the matter is that you are correct in your objection, but this being a Court trial, I would like to have the opportunity to rule on the admissibility later.

I will permit this testimony subject to your objection, with the understanding that the Court, re-

(Testimony of Alan C. Wigham.)

Regardless of whether you make a motion to strike it or not, the Court will not consider this testimony if it finds that your objection is well taken.

Mr. Boyle: And may that extend to the entire testimony, so I will not interject myself? [129]

Mr. Walsh: I won't stipulate to that. I think this is perfectly proper.

The Court: I think you had better make your objection, to keep the record clear.

Mr. Boyle: Very well, Your Honor.

The Court: Because there might be some questions the Court would want to rule differently on.

Mr. Walsh: Q. Mr Wigham, those questions that are asked by the doctor, the examining doctor for the company, are then recorded on what part of the application?

Mr. Boyle: The same objection, Your Honor.

The Court: Same ruling.

You may answer.

Mr. Walsh: You may answer.

A. The questions are, each and every one, asked by the doctor. If incomplete, it comes back. And once an application is in the doctor's hands, of course, we, as field men, are not allowed to know any of the medical evidence, and he sends it directly, after obtaining the signature to these questions from the applicant, he sends it directly to the head office, after getting all the answers to the questions.

Q. I call your attention to Part B of the application, and to the bottom of the page. To com-

(Testimony of Alan C. Wigham.)

plete that part of the application is the signature of the applicant required?

A. Oh, yes. [130]

Mr. Boyle: Same objection, Your Honor.

The Court: Same ruling.

Mr. Boyle: Calls for a conclusion of the witness.

The Court: Same ruling.

The Witness: It would only be returned——

Mr. Walsh: If Your Honor please, I would like to make this point right now: that the question of law that has been raised by the plaintiff here is whether or not there was a completed application.

Now, I think we are entitled to show that in this type of application for this type of policy what constitutes a completed application. That is certainly an essential part of the question, of the case, and this man has had 14 years experience as a district manager, and he has viewed many of these applications, and he knows the requirements of a completed application.

The Court: I am going to permit this testimony in at this time. I don't agree with you, but I am going to let you put the testimony in for the record, subject to the objection, and the Court will determine whether it shall be stricken later.

Mr. Boyle: We will add the further objection at this time that this not the best evidence. The document speaks for itself.

The Court: I think so, but I will make the same ruling. [131]

Mr. Walsh: Q. All right, Mr. Wigham, your

(Testimony of Alan C. Wigham.)

answer was Part B requires the signature of the applicant?

A. Oh, yes. It would be returned if there was no signature. Be no action.

Q. Speak up a little, please.

A. I say it would be returned and there would be no action, without his signature.

Q. And Part C of the application, that relates to what?

Mr. Boyle: May I have that question again, Mr. Walsh?

Mr. Walsh: Q. Part C of the application relates to what?

Mr. Boyle: Objection. It isn't the best evidence. The document speaks for itself.

The Court: Same ruling.

A. These are questions that only the medical—the examiner can answer—can ask and ascertain the answer from him. It would have to be done totally.

Mr. Walsh: Q. Now, in a case of this kind, with the detached agent, after the examining physician has completed the application, Parts B and C, does it come through your office? A. No;—

Mr. Boyle: Objection, Your Honor,—

A. (continuing) —it goes directly to the same office.

Mr. Boyle: (continuing) —incompetent, irrelevant and immaterial; not the best evidence; calls for a conclusion of [132] the witness, and is not the best evidence.

(Testimony of Alan C. Wigham.)

The Court: The answer is stricken for the purpose of entering that objection, and the Court will make the same ruling, and the answer will be reinstated.

Mr. Walsh: Q. You may answer the question.

A. Yes. If anything——

Q. Do I understand that——

A. Anything that goes to the medical examiner we do not see. It goes direct, in other words. We don't have access to the physical condition at all after it goes to the doctor's hands.

Q. And then it would go directly from the doctor to the San Francisco office?

A. Directly to the medical division in a prepared envelope.

The Court: For the purpose of the record, let it be shown that the same objection is made and the same ruling applies to all these answers.

Mr. Boyle: Yes, Your Honor.

Mr. Walsh: Q. Now, Mr. Wigham, I show you a letter of June 28, 1954.

If the Court please, counsel has a photostatic copy of this (exhibiting document to Mr. Boyle).

May we have just a moment, Your Honor? To save a little time, counsel and I are looking these things over, and he wants to be sure he has a copy of them.

Q. I show you a letter dated June 28, 1954. Can you tell me [133] what that is? Did you write that letter, Mr. Wigham?

(Testimony of Alan C. Wigham.)

A. Yes. Yes, it was written by me, or dictated by me.

Q. And it was sent to whom?

A. It was sent to our Ordinary Application Division.

Q. That is here in San Francisco?

A. Yes. The underwriters.

Q. That is what is called the Pacific Coast Head Office of the Metropolitan?

A. That is right.

Q. Thank you. Now, at the time you wrote this letter the stamp and the pencilled notes were not on there, were they?

A. Well, I don't know. Oh, no, this is the head office stamp. There are some pencilled notations there, and I wouldn't know about those.

Mr. Walsh: Yes.

I will offer that——

Mr. Boyle: One moment.

Mr. Walsh, may I make an inquiry? Mr. Walsh, is the purpose of this offer simply to show one of the circumstances under which the application was eventually taken, or is it your purpose at this time to offer this to vary the terms of Part A, which we claim to be a contract?

As a circumstance, I think it is admissible. But this relates to a policy in a different amount.

Mr. Walsh: I think that is a good question, Mr. Boyle. [134] I would like to know now what the theory of the plaintiff is, what your contract is that you are claiming.

(Testimony of Alan C. Wigham.)

And in reference to that, I wish to call the Court's attention to the fact that in the complaint the plaintiff attached only a photostat of Part A of the application and a photostatic copy of the receipt. However, the plaintiff has introduced into evidence for all purposes the complete application—the uncompleted, but the entire application, including Parts A, B, and C, a little slip of paper here that was detached and perforated there, and then has introduced a number of other documents, and then he makes objections about varying the terms of the contract.

I am rather at a loss to know what he claims is the contract.

If you would explain, Mr. Boyle, what your theory is?

Mr. Boyle: Yes. The contract in these documents is apparent in the terms of the receipt, and also in Part A of the application itself. That is the contract.

The Court: Well, I am of the opinion that that's your whole case, and you have to either fall or stand on it.

Mr. Boyle: Right, sir.

The Court: I feel very certain a great deal of this other testimony has nothing to do with this case so far as the Court passing on it is concerned.

Mr. Boyle: I understand that. [135]

The Court: The reason I have been very liberal is because it is a Court case, and I can assure both sides that I will not be prejudiced by any testimony

(Testimony of Alan C. Wigham.)

that I strike from the record before I finally pass on this case. But I am going to continue to be very liberal and let the testimony go into the record. I don't like to rule on objections the way I am doing it.

Mr. Boyle: I understand.

The Court: If I had a jury, of course, I wouldn't think of it.

Mr. Boyle: Of course not.

The Court: It makes me a little more work, of course. There are quite a few problems among the things that have been raised here that the Court should give consideration to before ruling.

Mr. Boyle: If Your Honor please, if I may elaborate a little bit on some of our principal objections: As I understand the extrinsic evidence rule, neither parol nor written evidence predating the contract, or subsequent to a contract, is admissible to vary its terms. Prior negotiations are merged in the contract.

However, evidence of the circumstances under which a contract is made is admissible for the purpose of putting the Court in the same position in which the parties found themselves at the time the contract was made, so that the Court [136] can truly interpret the intent of the parties in entering into it.

Now, that is, generally speaking, our position here in respect to that principal objection.

The Court: Well, you gentlemen have each had

(Testimony of Alan C. Wigham.)

plenty of time to study this case before you started the trial. The Court hasn't had that opportunity.

Mr. Boyle: I understand.

The Court: I think it is better to proceed the way we are now and let you present your case, and later, after the evidence is in, I will rule.

Mr. Boyle: Thank you.

Mr. Walsh: I might just make one remark in response to Mr. Boyle. Had he stayed with his theory, as he expresses it now, we would have probably finished this trial in a couple of hours.

The Court: Yes.

Mr. Walsh: But the plaintiff proceeded to introduce documents, and then put on all kinds of evidence to which I objected as being immaterial. Then Your Honor allowed the evidence in. Now he wants to cut me off from replying to the testimony that has already gone into the record.

The Court: Well, I let that testimony go in, as I remember, subject to your objection, with the same thought in mind, that I would rule on the admissibility later. [137]

I am inclined to agree with both of you that this case has to stand or fall on this application.

Mr. Walsh: On the whole application.

The Court: Yes.

Mr. Walsh: Not Part A of the application.

The Court: I think it has to stand or fall on it. But I am just saying that now. That is without prejudice to——

(Testimony of Alan C. Wigham.)

Mr. Walsh: I think this series of letters, Your Honor, will give you a true picture.

The Court: I am just wondering if you couldn't stipulate that those letters could go in evidence, to save some time, and get them in the record with the understanding that your objection applies to them.

Mr. Boyle: That is perfectly all right.

Mr. Walsh: All right. Then I would like to put them in one at a time. The first is a letter of Mr. Wigham dated June 28, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Walsh: The second one is a reply letter dated July 6, 1954, from Jonas Svendsen, Chief Underwriter.

The Court: It may be admitted. As he goes through those they may be marked and admitted, subject to the objection.

(The letter referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Walsh: The next one is a letter from Mr. Wigham to the Metropolitan Ordinary Underwriting Department dated July 15, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Walsh: And the next one is a letter from Jonas Svendsen to Monterey, dated July 20, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit D.)

Mr. Walsh: The next one is a letter from Mr.

(Testimony of Alan C. Wigham.)

Wigham to the Ordinary Underwriting Department, San Francisco, dated July 26, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit E.)

Mr. Walsh: The next one is a letter from Jonas Svendsen, Chief Underwriter in San Francisco, to Mr. Wigham in Monterey, dated July 30, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit F.)

Mr. Walsh: The next one is a letter dated August 20, 1954, from Mr. Wigham to the Claims Division of the Metropolitan in San Francisco.

(The letter referred to was received in evidence and marked Defendant's Exhibit G.)

Mr. Boyle: Mr. Walsh, before you proceed, and in order [139] to clarify the record, Your Honor, in respect to certain of these letters, the plaintiff will state at this time that we withdraw any objection to the letter of June 28, 1954; similarly, to the letter of July 6, 1954; similarly, we withdraw any objection to the letter of July 15, 1954.

Your Honor, to the letter of July 20, 1954, we withdraw any objection to the admissibility of the first paragraph of that letter. In respect to the second paragraph of that letter we restate our objection that it is in violation of the extrinsic evidence rule, and an attempt to vary a written contract by preceding writings and parol evidence.

We have no objection to the letter of July 26, 1954.

(Testimony of Alan C. Wigham.)

We have no objection to the letter of July 30, 1954.

In respect to the letters of August 20, and August 25, 1954, in addition to the general objection of incompetent, irrelevant and immaterial, the objection that it is a violation of the extrinsic evidence rule and the parol evidence rule.

We offer the further objection that there is no proof or showing that either of these documents ever came to the attention of the plaintiff.

The Court: All right. I will let you withdraw the objections which you stated you wanted to withdraw, and my same ruling will apply to the rest of it.

Mr. Walsh: If your Honor please, I would like to say [140] this right now: this contract, if any—this application—is a matter not between the plaintiff and the defendant. These negotiations were conducted between the soliciting agent of the Metropolitan and Mr. Grant.

Now, any statements that may have been made by Mr. Grant are admissible, of course, against interest. Apparently counsel is under the impression, and from the testimony would almost believe, that the plaintiff in this case was the applicant, but that is not the case.

The Court: Yes, I understand that.

Mr. Walsh: Now, I would like to have Exhibit A, and the rest of those, please.

Q. Defendant's Exhibit A, a letter from Mr. Wigham, in that it says (reading):

(Testimony of Alan C. Wigham.)

“Our agent sends us the attached trial application. On Policy 20158526-A there is an extra aviation premium.”

Now, that policy, Mr. Wigham, was a policy that had previously been issued, had it not?

A. Yes. What we call an in force policy.

Mr. Walsh: To save time, Counsel, I think we can stipulate, can we not, that that policy was issued in 1950, before Mr. Grant became a crop-duster?

Mr. Boyle: We have the exact date. I think the date was March, 1950. [141]

The Court: Well, there can't be any question about that?

Mr. Walsh: May I make a statement, and if I am incorrect, Counsel, you can correct me?—

Mr. Boyle: Pardon me. May 1, 1950.

Mr. Walsh: That policy, the number of which I just mentioned, was issued in 1950 when Mr. Grant lived in Concord. He was not a crop-duster, but at that time he was working for the Shuey Milk Company, I believe, as a truck driver, and was taking flying lessons.

According to Mrs. Kenny's testimony yesterday, she said he did not become a crop-duster until later.

Mr. Boyle: That is right.

Mr. Walsh: I think it will also be stipulated that the face amount of \$5,000, plus some additional sums, were paid on that policy, which is not involved here.

The Court: Yes, that is understood.

(Testimony of Alan C. Wigham.)

Mr. Walsh: Q. Now, in your letter, Mr. Wigham, of June 28th, it reads (reading):

“Our agent sends us the attached trial application. On Policy 20158526-A there is an extra aviation premium.

“Will you advise if an additional \$5,000 may be submitted on a whole life, paid up at age 85 plan, and what the extra aviation premium will be?”

Now, I want to ask you a couple of questions about that, [142] Mr. Wigham:

The attached trial application that you mentioned in there had nothing to do with that Policy Two Zero and so forth, did it? A. No.

Q. Why did you mention the number of that policy?

A. So the company could make an identification with our previous application on the risk.

Q. In other words, so they could identify who the insured was? A. Yes.

Q. Now, this trial application that you mention in there, where did that trial application come from?

A. It came from Mr. Price in Watsonville.

Q. I see. Now, correspondence and inquiries—rather, inquiries to the company that an agent wished to make had to come through your office, did they?

A. I beg your pardon? Oh, yes.

Q. Inquiries that an agent wished to make to the head office—— A. Yes.

(Testimony of Alan C. Wigham.)

Q. (continuing) —had to come through you?

A. Yes, they came through our district office.

Q. Now, in there you mention that the trial application is for \$5,000, is that correct?

A. Yes. [143]

Q. And the plan of insurance is what?

Mr. Boyle: Your Honor, please, the document is the best evidence.

The Court: Yes, the document is certainly the best evidence.

Mr. Walsh: Q. And the plan of insurance is what?

A. It is a life policy which does become paid up if the insured lives to age 85.

Q. Now, there was nothing in that trial application, to your recollection, about any family income, was there?

Mr. Boyle: Your Honor, please——

The Court: Just a moment.

A. I would have mentioned——

The Court: Just a moment.

Mr. Boyle: Objection; incompetent, irrelevant and immaterial. It is not the best evidence.

The Court: Yes. We are getting far afield here. I should sustain this objection, but in view of the fact that I have been letting you make this record, I will let him answer.

Certainly, under the rules, the document itself speaks for itself, and does not require explanation so far as the witness is concerned. But I will hear the explanation on the part of the witness.

(Testimony of Alan C. Wigham.)

I think, just in order to save time, that the record may show that the plaintiff has an objection to any testimony from [144] this witness explaining these documents, and that I will let him go ahead and testify with the understanding that the Court will determine later whether it will consider the testimony or not. [144-A]

Mr. Walsh: Q. All right, Mr. Wigham, you may answer. There was nothing in there about family income, was there? A. No.

Mr. Walsh: That was Defendant's Exhibit A that I showed you.

Q. Now, I am referring to the Defendant's Exhibit B dated July 6, 1954, from Mr. Svendsen, Chief Underwriter, in San Francisco, back to Monterey:

"We have your letter of June 28th together with partially completed Part A of application form 036K-9, indicating this is a trial application, and you request we advise you as to what the extra aviation premium will be on this case. In order that we may give this trial application further consideration and quote the proper aviation premium, will you kindly complete Form 036 Aer. 6, (and I will refer to that briefly as 'Aero 6') giving us full and complete details in regard to the applicant's past, present and future aviation activities. This aviation supplement should always be completed whenever an applicant intends to fly as a pilot or student pilot within the next 12 months. If you will please, therefore, complete the necessary aviation questionnaire,

(Testimony of Alan C. Wigham.)

further consideration can be given this trial application."

Now, you received that letter, did you, Mr. Wigham? [145] A. Yes.

Q. And I show you Plaintiff's Exhibit No. 5, Aviation Questionnaire. Is that the form that is referred to in Defendant's Exhibit B? A. Yes.

Q. Of course it was blank at that time, wasn't it? A. That's true.

Q. Now I will show you, or I will read to the Court, Defendant's Exhibit C. letter from Mr. Wigham to the Ordinary Underwriting Division of Metropolitan in San Francisco. It says:

"Attached is aviation questionnaire Form 036 Aer 6," and again I call your attention, Mr. Wigham, to this Defendant's Exhibit C. You wrote that, did you? A. Yes.

Q. And did you enclose with that, Plaintiff's Exhibit 5, the completed aviation questionnaire?

A. Yes, it would have been attached, if I stated it was attached.

Q. And from whom did you receive this completed aviation questionnaire before you mailed it to San Francisco?

A. I think it is from Agent George Price, Watsonville.

Q. Would that have come by mail?

A. Yes.

Q. Ordinarily, does it take about one day for mail to go back from Monterey to Watsonville?

A. Yes.

(Testimony of Alan C. Wigham.)

Q. And one day from Watsonville to Monterey?

A. That's true. All mail generally goes out in the late afternoon.

Q. Now, this next exhibit, Defendant's E, letter dated July 26, 1954, from Mr. Wigham to Ordinary Underwriting in San Francisco, says:

"Thank you for your advice regarding aviation premium. This detached agent now writes that the prospect is interested in Family Income with Whole Life Paid-Up at age 85 and asks the amount of extra aviation premium on the term element. This, we presume, will differ from that of the permanent insurance. Will you again give us your advice? The prospect is interested in \$5,000.00 on the above plan."

That letter was dated July 26, 1954. You wrote that, Mr. Wigham? A. Yes.

Q. In there you mentioned that this detached agent now writes. Do you have in your file or have you been able to find, any letter from Mr. Price to you about that time regarding that Family Income provision?

A. I wonder if you would ask that question again, Mr. Walsh.

Q. Have you been able to find any letter that Mr. Price wrote to you about the Family Income feature? [147]

A. No, I have nothing in my file other than your file, which you have. I wouldn't recall any other information in this.

(Testimony of Alan C. Wigham.)

Q. Well, I have the complete file and I have not been able to find anything.

A. It asks here what the rate would be on family income, so this would be the first letter, and generally there is a reply telling what the rate would be from the head office.

Q. Would you say, then, that on or about July 26, 1954, was the first time anything came to your knowledge about Mr. Grant being interested in a Family Income feature?

A. That would be the first letter.

Q. Yes. And at that time, so far as you know, the amount of permanent insurance that he was interested in was only \$5,000.00 still?

A. \$5,000.00, the amount stated.

Q. Yes, thank you. Tell me, Mr. Wigham, why did you have to write to San Francisco to try and find out what the extra annual aviation premium was?

Mr. Boyle: Objection, Your Honor.

The Court: Same ruling.

Mr. Boyle: Incompetent, irrelevant and immaterial, calls for the conclusion of the witness, it is argumentative, it is not binding on the plaintiff, self-serving declaration.

The Court: Same ruling and I will reserve my ruling on it.

The Witness: Well, I wrote because we have no authority, [148] and in this particular case it is not in the rate book, which is very, very thorough, and

(Testimony of Alan C. Wigham.)

as a matter of fact, I didn't think the Company would entertain the risk at all.

Mr. Walsh: Q. You find in the current rate book at that time any rate quoted on a crop duster?

A. No.

Q. With reference to Defendant's Exhibit F, letter dated July 30, 1954, from Mr. Svendsen to Monterey—

Mr. Walsh: Oh, pardon me. I am a little out of order. The next one is Defendant's Exhibit D, a letter of July 20, 1954, from Mr. Svendsen to Monterey.

Q. By the way, Mr. Wigham, you have received this letter, have you? A. Yes.

Q. And when you received it, was any of that underlining or handwriting on it?

A. Well, this "make copy" up here looks like my writing, very much like my writing.

Q. That was made after you received the letter?

A. Yes.

Q. But at the time you received it, there was nothing but the typewritten letter, is that correct?

A. That's all.

Mr. Walsh: I should like to read this, if Your Honor please. This is a letter dated July 20, 1954, Defendant's [149] Exhibit D:

"Thank you for your letter of July 15th to which you attached aviation questionnaire Form 036 Aer. 6. As previously requested in your July 6th letter, it has been determined that we can consider your prospect for insurance with the basic extra annual

(Testimony of Alan C. Wigham.)

aviation premium of \$20.00 per thousand. The aviation questionnaire form you sent us in connection with the trial application will suffice if you complete an application within the next week or ten days. We suggest, therefore, that if our tentative offer is acceptable, that you complete the application, arrange for a medical examination between Mr. Grant and one of the authorized examiners in your territory, and order the mercantile report in the usual manner. This must not be construed as a promise to issue, as we can make no definite offer until we have viewed the completed papers. If an application is submitted, please refer to this correspondence.

“We are returning herewith the trial application for whatever disposition you care to make of it.”

Q. Now, on this letter you say you wrote “make copy”? A. Yes.

Q. And then what else appears on there that you caused to be made, if anything?

A. I didn't do it directly, but the clerk would have followed [150] an office procedure of charging it out to Mr. Price and stamping it, “Please return this letter with reply by July 31st.”

Q. Did you cause that letter to be sent to Mr. Price in Watsonville? A. Yes, I did.

Q. And by that stamp and writing that you have just mentioned, that was requested that Mr. Price return it when? A. By July 31st.

Q. Thank you. And did you receive it back from Mr. Price?

(Testimony of Alan C. Wigham.)

A. I couldn't answer that question. Ordinarily I can tell you that the girl, when you see the written cross, there is a cross there, that means that they have had a reply, but she doesn't state whether it is before July 31st or afterwards. I wouldn't know about that.

Q. But this letter that I have came out of your file, did it not? A. That's right.

Q. Thank you. Now, so far as you were concerned on that date of July 20th, you did not know that Mr. Grant was interested in anything more than \$5,000.00 in insurance, is that correct?

A. Only in the amount that is stated there, because that was the amount that had been mentioned by Mr. Price.

Q. Yes. And still nothing is said about the Family Income feature, correct?

A. That's right. [151]

Mr. Walsh: I call Your Honor's attention to Defendant's Exhibit E, letter from Mr. Wigham to Ordinary Underwriting in San Francisco, re Trial Application, Peter Grant:

"Thank you for your advice regarding aviation premium. This detached agent now writes that the prospect is interested in Family Income with Whole Life Paid-Up at 85 and asks the amount of extra aviation premium on the term element. This, we presume, will differ from that of the permanent insurance. Will you again give us your advice? The prospect is interested in \$5,000.00 on the above plan."

(Testimony of Alan C. Wigham.)

Q. You wrote that letter, did you, Mr. Price?

A. Yes—Wigham.

Q. Pardon me, Mr. Wigham.

The Court: We might take the morning recess for ten minutes.

(Recess.)

Mr. Walsh: Q. Referring to Defendant's Exhibit F, letter dated July 30, 1954, from Jonas Svendsen, Chief Underwriter, Metropolitan, to Monterey, did you receive that letter, Mr. Wigham?

A. Yes.

Q. Now, when you received it, did it have any of the underlining or any of the handwritten notations on it?

A. Well, the handwritten notations are mine.

Q. No, I am talking about when you received the letter.

A. No, there was no underlining on it or no writing on it. The letter was received as is.

Mr. Walsh: All right, fine. Your Honor, may I speak to counsel for a moment?

(Conversation among counsel out of hearing of the reporter.)

Mr. Boyle: Yes, subject to my objection, of course, you may put it in.

Mr. Walsh: If Your Honor please, I am coming to a part of something that Mr. Wigham wrote in his handwriting, and in the deposition of Mr. Wigham, page 6, lines 18 to 22, the reporter, by the very nature of the thing, the thing that was read, could not get it exactly right, and we have

(Testimony of Alan C. Wigham.)

asked that the deposition be corrected accordingly. When the time comes and I ask Mr. Wigham the question, I will have to show the reporter this correction so that he can copy it correctly.

Referring to the deposition of Mr. Wigham, page 6, lines 18 to 22, inclusive, this is the correction, after the word "yes", and to the end of the wording, it should read as follows:

"\$20.00 for Life Paid-Up at 85 or other plans except Family Income.

"For Family Income \$40.00 per \$1,000.00.

"With \$1,000.00 and \$20.00 per month \$60.00 per \$1,000.00. [153]

"Better stick to a straight plan of insurance—no Family Income."

Counsel has kindly stipulated that that correction may be made in Mr. Wigham's deposition subject to any objection that he may have.

Mr. Boyle: So stipulated, Your Honor.

Mr. Walsh: Q. Now, coming back to the defendant's exhibit F, letter from San Francisco from Mr. Svendsen to Monterey dated July 30, 1954:

"We have your letter of July 26th informing us that you would like to know the extra aviation premium on the term element in connection with Family Income Whole Life Paid-Up at age 85 Plan. In this regard we refer you to page 661 of the current Rate Book. At the bottom of the page, wherein it indicates that if a policy on the Family Income benefit is applied for, providing \$10.00 per \$1,000.00 monthly income, the basic extra annual

(Testimony of Alan C. Wigham.)

aviation premium will be twice that quoted; and if a policy is applied for with a \$20.00 per \$1,000.00 monthly income, the basic extra annual aviation premium would be three times the amount quoted. And if the application is for the family income benefit to age 65, providing \$10.00 monthly income per \$1,000.00, the basic extra annual aviation premium would be between two and three times the basic amount quoted. We trust [154] this answers your inquiry. Jonas Svendsen, Chief Underwriter."

Q. Mr. Wigham, you received that letter, you testified, and below that there is some handwriting. Is that your handwriting?

A. Yes, definitely.

Q. Now, would you read that to us, please?

Mr. Boyle: Now, if Your Honor please, may we at this point interpose an objection?

Mr. Walsh: I have a copy here.

Mr. Boyle: Simply that my objection may be stated, it is self-serving declaration, conclusion of the witness, hearsay, not binding on the plaintiff in this action, or the deceased, not communicated to the deceased or to Mrs. Grant, improper foundation.

The Court: I think your objection is well taken, but I will let him answer it.

Mr. Walsh: I will connect it up.

The Court: Subject to that same ruling I made.

Mr. Walsh: Q. Will you read that, please?

A. "\$20.000 for life paid-up at 85 or other plans except family income.

(Testimony of Alan C. Wigham.)

“For family income \$40.00 per \$1,000.00.

“With \$1,000.00 and \$20.00 per month \$60.00 per \$1,000.00.

“Better stick to a straight plan of insurance—no family income.”

Q. Can you tell us why you wrote that on the letter? [155]

Mr. Boyle: Same objection, Your Honor.

The Court: The same ruling.

The Witness: In the first place, I was surprised the Company would make an offer at all; it wasn't in the rate book, and just previously I had read an article in the Saturday Evening Post by a crop duster where he was a sole survivor out of a group, and the article stated that he had the most hazardous occupation. We declined certain hazardous occupations, and this looked to me like an exceptionally hazardous one, so I put that notation down that if he had a chance to get insurance at all, we'd better stick to a straight life plan, because if there was anything compounding the risk, maybe, any health or any other risk to be entertained, maybe over-weight, if it compounded the risk, then the agent would have to go without family income, because if he was rated, we didn't have a family income on, say, a special class policy that normally a rating list would get.

Q. Well, now, was there another purpose in writing that notation on there?

A. Well, I wanted to have him make sure about the extra aviation premium and the extent of it.

(Testimony of Alan C. Wigham.)

Q. Did you send that letter?

Mr. Boyle: If Your Honor please, if we may move to strike, the same objection stated to the last one.

The Court: Yes. [156]

Mr. Walsh: This is preliminary, Your Honor. I will connect it up.

The Court: Yes, I think it had better be understood this objection runs to all this line of testimony.

Mr. Boyle: Yes, sir.

Mr. Walsh: Q. Did you send that letter to Mr. Price? A. Yes.

Q. Now, speaking here as of this time, July 30, 1954, of the family income benefit, can you tell us whether that is separate and distinct from the insurance, the permanent insurance?

A. Yes, the letter was on the aviation premium, extra aviation premium, and I just wanted to make sure that he knew he would have that additional premium for the aviation in addition to the insurance.

Q. So at that time, so far as you knew, it was still \$5,000.00 of permanent insurance that they were asking?

A. That's all the previous letters had mentioned or entered into, was \$5,000.00.

Q. And the premium on that, of course, would be in addition to this aviation risk?

A. That's right.

Q. Do I understand, then, from your testimony

(Testimony of Alan C. Wigham.)

that the family income feature only of the policy, based on the—I will withdraw that question.

Do I understand from your testimony, then, that the premium [157] on the aviation risk only, where a policy is applied for for permanent insurance, plus the family income feature, the basic aviation premium would be \$40.00 per thousand per year if they are asking for an income of \$10.00 per \$1,-000.00 per month? A. That's right.

Mr. Boyle: In connection with that, may we also have an objection that it is not the best evidence. I assume that the Metropolitan Company has a rate book with complete instructions to the agents here.

The Court: Yes, your objection will be noted and it will be stricken by the Court if I determine your objection is well taken.

Mr. Walsh: I call the Court's attention to Defendant's Exhibit G, letter dated August 20, 1954, from Alan C. Wigham to Claim Division of Metropolitan. Did you write that letter, Mr. Wigham?

A. Yes.

Q. Thank you.

Mr. Walsh: This refers to Policy No. 20158526-A, Peter Grant.

Q. Now, the handwriting on there, which says, "Died August 13," is in pencil; is that yours?

A. No.

Q. The typewritten part of the letter reads as follows: [158]

"A claim will follow on the above. We attach a newspaper story. Our agent advises that it is to be

(Testimony of Alan C. Wigham.)

determined if direct cause of death is from injuries or poisoning from the load carried. He also states that a neighbor advised the claimant that double indemnity would never be paid and had her go to an attorney. We hope she is not entertaining unnecessary expense. We should also attach an application taken on this life. The application was taken several days before the loss and the applicant stopped at the doctor's office to arrange a medical. We learned too that the wife of the applicant gave our agent a check for \$53.36 and asked that he hold it a day or two. The check has been returned and the deceased's wife understands that the Company is on no risk for this application."

Now, with that letter, Mr. Wigham, did you send this application, Plaintiff's No. 1?

Mr. Boyle: To the letter, the further objection in addition to those stated, that it is hearsay and self-serving.

The Court: Yes, I am sure it is, but I will entertain it under the same ruling I have heretofore made.

The Witness: I wouldn't recall unless the letter said it was attached.

Mr. Walsh: Q. Unless what?

A. The letter itself said it was attached, that it would have [159] been attached. But I wouldn't recall from memory. If the letter said it was attached, it would have been attached—otherwise we would have had a letter back that they didn't receive it.

(Testimony of Alan C. Wigham.)

Q. Would you say that this would be a notice to the Company by you that the insured had died, that is, the insured under the other policy?

A. Yes, it was a notice that he had died under the policy in force, and then I asked here, "Also attached application to this life." So that application was on the back of that letter.

Q. I see. And this is the only application you knew of, and I am showing you Plaintiff's Exhibit No. 1? A. That's right.

Mr. Walsh: That's all, Mr. Wigham, but just a moment, because counsel probably has some questions to ask you.

Mr. Boyle: No questions, Your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Walsh: Mr. Price.

The Clerk: Mr. Price has been sworn.

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recalled as a witness, being previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Walsh: Q. Mr. Price, did you ever tell Mr. Grant [160] that \$53.36 was the full first premium in connection with this application, Plaintiff's Exhibit No. 1? A. No.

Mr. Boyle: Your Honor—

The Court: The answer may be stricken.

Mr. Boyle: —I object to the question on the

(Testimony of George Price.)

ground that it is not the best evidence; it is an attempt to vary a written contract by oral testimony, and it is leading.

The Court: Well, certainly the insured isn't here to dispute anything this man says. I think I should sustain this objection. Of course the question is leading. But I will let him answer it with the reservation that I will strike it if I determine later to do so.

Mr. Walsh: The answer may stand, then?

The Court: Yes.

Mr. Walsh: May Your Honor indulge me in asking some questions in the nature of leading questions for the purpose of shortening time?

The Court: Well, I think I had just as well let you.

Mr. Walsh: Q. Mr. Price, did you ever tell Peter Grant that the Company would insure him?

A. No.

Mr. Boyle: Again self-serving, Your Honor, hearsay.

The Court: Yes, same objection, same ruling.

Mr. Walsh: Q. Did you ever tell Peter Grant that the [161] Metropolitan would insure him on his business? A. No.

Mr. Boyle: Same objection, Your Honor.

The Court: Yes. Let it be understood that I will recognize your objection to these matters and permit the testimony, subject to the objection. [162]

Mr. Walsh: Q. Mr. Price, did you ever tell

(Testimony of George Price.)

Peter Grant that the Metropolitan Life Insurance Company would insure him for any amount?

A. No.

Mr. Boyle: Same objection.

The Court: Same ruling.

Mr. Walsh: Q. Did you ever tell Mr. Grant that the Metropolitan Life Insurance Company would insure his life on any particular plan of insurance?

A. No.

Mr. Boyle: Same objection.

The Court: Same ruling.

Mr. Walsh: Q. I will show you defendant's Exhibit D, a letter dated July 20th, 1954, from Mr. Svendsen to the Monterey office. Will you take a look at that, please?

Did you receive that from Mr. Wigham?

A. Yes.

Q. Did you show that letter to Mr. Grant?

A. Yes, sir, at the time the application was written.

Mr. Boyle: Your Honor, may this witness's answers be limited directly to the questions?

The Court: Yes.

Mr. Boyle: We move to strike the answer as hearsay, self-serving, and not responsive.

The Court: The motion to strike will be taken under [163] advisement and passed on at the time of the other rulings.

Mr. Walsh: I will agree that it may all go out except the answer "yes".

Mr. Walsh: Q. Now, there is some underlining

(Testimony of George Price.)

Grant talked about? A. Yes.

Q. Now, was there anything in the current rate book at that time which would show the basic extra aviation premium for a crop duster? A. No.

Mr. Boyle: Objection.

The Witness: None.

Mr. Boyle: Not the best evidence.

The Court: Well, I will let him answer it. I will consider this record that you have a motion to strike all of this testimony that has been given in connection with his statements to Mr. Grant.

Mr. Walsh: Q. I show you plaintiff's Exhibit 1, the application dated August 11, 1954, part A, number 18, where it says, "premium payable". You put a cross, did you, in the little box opposite "monthly" for premium payment?

A. Yes, sir. [166]

Q. And at whose request did you so mark the application?

A. At the request of both Mr. and Mrs. Grant.

Mr. Boyle: May I follow that just one moment, Mr. Walsh? To what are you referring?

The Witness: Monthly premium basis.

Mr. Walsh: How the premium was to be paid.

Mr. Walsh: Q. Now, also under 18 on part A it says, "classification applied for", and there are several classes: ordinary, intermediate, special class, special class B.

I will show you that, Exhibit 1.

When you mark any of those things where there is a little square, what sort of mark are you sup-

(Testimony of George Price.)

posed to put in there? A. A cross.

Q. A cross? A. A cross.

Q. You have the cross in front of what classification? A. Intermediate.

Q. There is also a mark on there, is there not, in the square in front of "ordinary". What kind of a mark is that?

A. An error mark. It is just one line, and I realized it was an error, and I——

Q. (Interposing) It is one line. It isn't a full cross? A. No.

Q. How did you happen to put that in there?

A. Error. [167]

Q. It was an error? A. Yes.

Q. Was it your intention at that time to mark it "intermediate" or "ordinary"?

Mr. Boyle: Objection. Self-serving and hearsay.

The Court: Yes, it is, but I will let him answer, but I will let him answer it with the same reservation I have made heretofore.

A. The only reason I marked it "intermediate" is, I felt——

Mr. Walsh: Q. No, that isn't the question. The question is—will you read the question to him, please?

(Question read by the Reporter.)

A. I felt he may be rated "intermediate" and not "ordinary".

Mr. Walsh: Q. Why did you leave that slant mark in the box in front of "ordinary"?

Mr. Boyle: Same objection, Your Honor.

(Testimony of George Price.)

The Court: Same ruling.

A. Company's rules are you cannot erase anything from an application.

Mr. Walsh: Q. Why did you classify the applicant as "intermediate"?

Mr. Boyle: Same objection.

The Court: Same ruling.

A. Just a matter of judgment, personal judgment. I wasn't sure. [168]

Mr. Walsh: Q. Oh, by the way, I am referring to Plaintiff's Exhibit 1 on the back part where it says "report of inspection". There is a question, "give information available as to amount and source of applicant's annual income", and you have down here, "\$15,000".

From whom did you obtain that information?

A. From Mr. Grant.

Q. Thank you. Now, Mr. Price, a whole life insurance means what insofar as payment of premiums is concerned? A. A whole life.

Q. Does it mean that if the applicant has a policy of insurance issued he would have to pay the premiums so long as he lived? A. Yes.

Q. And is any part of whole life insurance payable prior to the death of the insured?

A. No.

Q. Payable only upon death?

A. Yes, sir.

Q. The family income feature of a policy of whole life with family income, what is the family income feature, what type of insurance is that?

(Testimony of George Price.)

A. It is added family protection on a depreciating term. From the day he buys it, it depreciates during the period of twenty years. At the end of twenty years it ends. [169]

Q. In other words, you have a combination of whole life permanent insurance payable only upon death, plus decreasing term insurance, is that it?

A. Yes, sir.

Q. Was Mr. Grant—withdraw that. Did you ever quote to Mr. Grant during his lifetime a premium of \$400 annually for a whole life family income policy?

A. Words were spoken of an annual basis, but primarily they were interested in a monthly basis.

Q. Now, the premium for whole life family income for a man without an extra hazardous risk could be found in the rate book, could it not?

A. Yes.

Mr. Boyle: Same objection. Self-serving.

The Court: I think it is immaterial.

Mr. Boyle: Not the best evidence.

The Court: I think it is not material, but I will consider your same objection.

Mr. Walsh: But the aviation—the basic premium for the aviation hazard could not be found in the rate book at that time? A. No, sir.

Q. And did you ever receive from the company any information about that extra aviation premium quoted on a monthly premium basis? [170]

A. No, sir.

Mr. Walsh: I am almost through, Your Honor.

(Testimony of George Price.)

Mr. Walsh: Q. Now, when you called on Mrs. Grant, now Mrs. Kenny, on August 14th, the day after Peter Grant's death, and gave her back the check did you ask her to sign any papers?

A. I can't recall asking her to sign any papers. I did ask her for the receipt and she said it wasn't available, she couldn't find it. Now, whether I asked her to sign at that moment I can't recall.

Q. Did you at that time or at any time on August 14th of 1954 say to Mrs. Grant, "Well, if you will sign these we will advance you money"?

A. Oh, I beg your pardon, I believe that Mr. Caruso was with me. Now I am recalling. I believe Mr. Caruso was with me. He was at that time the assistant—or he was the——

Mr. Walsh: Just a moment. Will you read the question, please?

(Question read by the Reporter.)

A. I told her this——

Mr. Walsh: Q. You can answer that yes or no.

A. Yes. We had a release form, and I gave her back the check and I asked her for the original receipt that I advanced, which she said in her sorrow at that time she couldn't find it and didn't know where it was, and she was very much upset; and I didn't insist upon retrieving the receipt any further, and I [171] asked her if she would sign a release statement, and I believe she said she wouldn't sign anything.

Q. You asked her if she would sign what?

(Testimony of George Price.)

A. We have a release form and she said she wouldn't sign anything.

Q. Did you say to her at that time or any time on August 14th, 1954, that you would advance her money?

A. I didn't say anything about advancing anything. Nothing was spoken of except the check that I gave to her. There was nothing else. I had no power to advance her any money.

Now, whether this had anything to do with the old policy I can't recall, because we are in the habit of advancing money on old policies.

Q. I see. When you went there on August 14th, you also had in mind the fact that there was a previous policy in force? A. Right, right.

Q. But any question of advancing money had nothing to do with this particular application?

A. None whatsoever. We are in the habit of advancing money to people who are in any type of need on old insurance.

Mr. Walsh: That is all.

The Court: I would like to ask you one question.

A. Yes, sir?

The Court: Where is that release that you had prepared for her to sign? [172]

A. Well, I don't have that with me. We have duplicate copies.

The Court: Do you have a duplicate with you?

A. No, not with me.

The Court: Was it all filled out with her—for her signature?

(Testimony of George Price.)

A. That I can't say, Your Honor. I don't recall.
The Court: That is all.

Mr. Boyle: We will want to cross examine Mr. Price, of course, Your Honor.

The Court: Well, I thought maybe we might complete it before the noon recess, but we had better recess. Recess until two o'clock.

(Recess until 2:00 o'clock p.m.) [173]

Thursday, June 20, 1957—2:00 o'clock p.m.

Mr. Walsh: Mr. Price, will you come forward, please?

Your Honor, I want to ask Mr. Price a few more questions.

The Court: All right.

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a witness on behalf of the defendant, on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination—(Resumed)

Mr. Walsh: Q. Mr. Price, going back to August 14th of 1954 when you called at the residence of Mrs. Grant, now Mrs. Kenny, and returned the check to her, I understand you asked for the receipt; she said she didn't have it; and then you—

Mr. Boyle: Misquotation of the evidence.

The Court: Yes.

Mr. Boyle: She did not say she did not have it.

The Court: I will remember what she said.

(Testimony of George Price.)

Mr. Walsh: Q. All right, what did she say about the receipt?

A. Said she couldn't find it at present; didn't know where it was.

Q. Now, you said you asked her to sign some other papers?

A. Just a form showing I had returned whatever money by cash or check she gave me, and nothing else. [174]

Q. You mentioned that that was a release?

A. Mentioned it was a release form for any moneys that was given to an agent. It is a company requirement, when you return any money, you have a receipt showing that you returned that money to the person who gave it to you.

Q. You did not offer her any money to sign a release of any claims?

A. Oh, no, I had no money to give her.

Q. Is it a requirement of the company that when you return money, that you must have something to show for it?

A. Yes, sir.

Q. And was that the purpose in asking her to sign it?

A. That was the purpose, yes.

Mr. Walsh: That's all.

Mr. Boyle: Very well.

Mr. Walsh: Oh, one further thing, if you please.

There is a stipulation, Mr. Brauer, in your letter to me of May 21, 1957.

Counsel for the plaintiff has stipulated, Your Honor, that if the autopsy surgeon were called he would testify that Peter Grant was approximately

(Testimony of George Price.)

six feet two inches and weighed about 225 pounds on August 13, 1954, and that they will reserve the right, however, to object to the admissibility of this evidence on the ground that it is neither material nor relevant. So I should like to put into evidence, as though we [175] had called the autopsy surgeon, the autopsy on Peter Grant the same day as his death.

Mr. Boyle: So stipulated.

Mr. Walsh: And that at that time he was approximately six feet two and weighed about 225 pounds. And, of course, that would be without his clothes.

Mr. Boyle: The stipulation does not say that.

The Court: Well, I think it is in evidence that it was about his weight, by a doctor. I can see no reason for delaying the trial on this.

Mr. Walsh: Well, I think without having to bring the autopsy surgeon all the way from Watsonville, I think we all know it is customary when an autopsy is performed that the body is weighed without any clothes, and measurements are taken.

Mr. Boyle: Well, you see, Your Honor, the stipulation is framed in the terms of the autopsy report itself, which says, "approximately six feet two and about * * *," indicating that the body was not, in fact, weighed, but that it was an estimate.

The Court: Well, can you stipulate to it?

Mr. Boyle: Yes, in those terms of our written stipulation.

Mr. Walsh: Well, the terms "was approximately

(Testimony of George Price.)

six feet two and weighed about 225 pounds." [176]

The Court: Stipulation may be received.

Mr. Walsh: Thank you.

Mr. Boyle: Anything further, Mr. Walsh?

Mr. Walsh: No, I am through with the witness.

Mr. Boyle: May it please your Honor, on May 17, 1956, the plaintiff made a motion for production, inspection and copying of documents, writing, memoranda, and all communications in the possession of the defendant pertaining to the application of Peter Grant dated August 11, 1954, for a life insurance policy. Now Mr. Price states that he presented some form which he describes as a release, and he wanted Mrs. Grant to sign it, on August 14th.

Do you have that, Mr. Walsh?

Mr. Walsh: No, I don't. The first I heard of that was when Mr. Price testified—or rather, the first I heard of it was when Mrs. Kenny testified.

Cross Examination

Mr. Boyle: Q. Mr. Price, do you have that among your papers?

A. It is an ordinary—it is just a simple form. I don't have any—we can—it's just an ordinary form that the company requires when we give any money back, or take any money.

Q. Mr. Price, the question was, do you have that paper among your possessions? [177]

A. I don't have any papers of that kind among my possessions. It is just an ordinary form——

(Testimony of George Price.)

The Court: Q. You don't have it any more?

A. Huh? Well, it's——

Q. Just answer the question.

A. No, I don't.

Mr. Boyle: Q. What did you do with that paper?

A. Just a form we carry around with us. We have dozens of them.

Q. Well, that particular paper that you——

A. It wasn't a particular paper. It was a release form of moneys that we give anybody when we deliver a check or money. It is simply a form stating we delivered that money to them and we want a receipt for the money we gave to them.

Q. Mr. Price, when you couldn't get Mrs. Grant to sign that paper, did you destroy that paper?

A. Well, I didn't do any more about it, but left the house and put it back with all my other forms that I have. There was nothing written on the form. It is just a plain, ordinary office form, just like many other forms we have. It had nothing, as far as the company—there was no printed matter on it.

Q. Was there any written matter on it?

A. No written matter on it at that moment.

Q. Well, hadn't you written something into that form? [178]

A. No, I hadn't written anything. I would write it—if she signed her name I would fill it out in front of her.

Q. Now, there's another paper that has been mentioned here, Mr. Price, called a trial applica-

(Testimony of George Price.)

tion, which you have signed, sometime in the latter part of June, 1954. After that trial application left your hands did it ever come back to your possession?

A. Not to me, personally, that I know of.

Mr. Boyle: On the trial application can we stipulate——

Mr. Walsh: The trial application, the correspondence shows——

May I have the exhibits?

Defendant's Exhibit G, letter of August 20, 1954, from Mr. Wigham—no, I am sorry, that's the wrong one. It's Defendant's Exhibit D, letter from Mr. Svendsen, Monterey, dated July 20, 1954, and it states (reading):

"We are returning herewith the trial application for whatever disposition you care to make of it."

I informed Mr. Brauer some time ago that we had made a search for that, and apparently it has been destroyed or was lost, and I believe Mr. Wigham testified in his deposition that he probably sent it to Mr. Price; that it would have been of no further use in the district office. Mr. Price searched for it and was unable to find it. [179]

Mr. Boyle: Very well.

Q. Mr. Price, I will show you Exhibit 1. Now, that trial application which you took in the latter part of June, 1954, was it on the same type of form as this one? A. Same type of form.

Q. Now, is it not also true that some place on that trial application you wrote in ink, "Trial"?

(Testimony of George Price.)

A. Yes.

Q. At the time you took that trial application did you ask Mr. Grant for a premium?

A. No.

Q. I direct your attention to Section 18 of Exhibit 1, and particularly to those boxes opposite these words: "Classification applied for." On that trial application did you make any marks in any of those boxes?

A. To the best of my knowledge I would say no.

Q. Now, Mr. Price, I think you testified this morning—correct me if I am wrong—that the first time that a policy in the sum of \$10,000 was on August 10, 1954?

A. I said that.

Q. Is that true?

A. I am quite sure.

Mr. Boyle: May the witness have his deposition, Your Honor?

Q. Mr. Price, do you recall the 6th day of July, 1956, when [180] your deposition was taken in the offices of Hudson, Wyckoff & Parker in Monterey?

A. I recall being there.

Q. And at that time were you sworn by a Notary Public?

A. Yes.

Q. And during the proceedings that afternoon did Mr. Brauer put certain questions to you?

A. Yes, sir.

Q. And did you answer those questions as they were put to you?

A. I believe I did, the best of my recollection.

Q. And were the questions and the answers transcribed by a reporter, such as is present here?

(Testimony of George Price.)

in the court? A. Yes.

Q. Will you look at your deposition in your hands, at page 19, line 21 through line 9 on page 20, and will you please read to yourself the questions and the answers?

Mr. Walsh: Pardon me, Counsel. Is there a page 19 of the deposition? Mine shows——

Mr. Boyle: Page 18, possibly. Were there some skips in the page?

A. Yes, this is an error here some place.

Q. Well, I direct your attention to the page labeled both 18 and 19, and the line beginning 19 and continuing through the next page, which is No. 20, through line 9.

A. (Witness peruses deposition.) [181]

Q. Have you finished reading it, Mr. Price?

A. I have read it.

Q. Now, on that occasion was this question put to you, beginning page 18-19, line 21, as follows (reading):

“Q. I see. And in the policy that he was then applying for, the lump sum was \$10,000?”

Was that question asked of you?

A. It was asked, yes, sir.

Q. And did you give the answer, “Yes, sir”?

A. That’s right.

Q. And then was this question asked (reading):

“Q. Did you explain that to them at that time?”

A. Yes.

Q. And did you give this answer: “Yes, sir, thoroughly explained it to him.”?

A. Explained what?

(Testimony of George Price.)

Q. Did you give that answer: "Yes, sir, thoroughly explained it to him."?

A. Probably.

Q. Was that your answer to the question put?

A. What was the question put?

The Court: You just read it there. Look at it and see.

The Witness: All right.

Mr. Boyle: Q. Was the question put to you (reading):

"Did you explain that to them at that time?"

A. Is that about the family income you are speaking of?

Q. I am simply reading your deposition. Was that question put to you? A. Yes.

Q. And did you answer that question as follows (reading):

"A. Yes, sir, thoroughly explained it to him."?

A. Yes.

Q. Is that your answer? A. Yes.

Q. Then was the question put to you (reading):

"Had he at any prior occasion mentioned \$10,000 to you, that he desired a \$10,000 policy?"

Was that question put to you? A. Yes.

Q. (reading) "Yes, he had."

Did you make that answer? A. Yes.

Q. Was this question put to you (reading):

"Q. When did that occur?"

Were you asked that?

A. In the interim of the conversation we had, it says here.

(Testimony of George Price.)

Q. Were you asked the question: "When did that occur?"

A. During the conversation we had here, it says here.

Q. I am just asking you, Mr. Price, if that particular question was put to you. [183]

A. Yes.

Q. Now, did you answer that question as follows (reading):

"A. That occurred in the interim of this conversation we had. I mean from the time I knew him, he expressed a desire to buy \$10,000, but he said he couldn't afford very much. That is the reason he wanted term. I showed him that he could buy a low cost straight life policy combined with term, which would serve the same purpose as a \$5,000 policy that he originally spoke of."

A. Yes.

Q. Did you make that answer?

A. Yes.

Q. Now, Mr. Price, isn't it a fact that from the time you first talked insurance to Peter Grant, that he expressed a desire for a \$10,000 policy?

A. Offhand.

Q. Now, isn't it also a fact that from the first time you met Peter Grant and discussed insurance with him he asked you for a term policy?

A. He did.

Q. And what did you tell him in respect to a term policy?

(Testimony of George Price.)

A. Because of his occupation I told him that he couldn't buy term insurance.

Q. And then you suggested to him that he buy whole life [184] insurance, isn't that right?

A. At that time, yes, sir.

Q. Now, Mr. Price, correct me again if I am wrong. Did you testify this morning that the first time a family income policy was mentioned was on the evening of August 10, 1954?

A. I can't recall exactly. That's too long ago.

Q. Well, did you so testify this morning?

A. I might have said that, but surely I can't say.

Q. Are you now changing your testimony?

Mr. Walsh: No, he didn't testify to that. He didn't testify to that.

Mr. Boyle: May we have the correct testimony?

Q. My notes are wrong, then?

A. I can't—

Q. When was family income, then, first mentioned? A. It was later.

Q. Later than what?

A. Later than the proposal of \$5,000. A family income was mentioned much later.

Q. But the family income was first mentioned by you, wasn't it, Mr. Price?

A. Later, yes, sir.

Q. And family income was mentioned to you—or mentioned by you to Peter Grant long before August 10, 1954, wasn't it?

A. I can't recall exact dates at all. [185]

Q. Mr. Price, I will show you Exhibit E. Now,

(Testimony of George Price.)

does that letter refresh your memory, Mr. Price?

A. Yes, it does.

Q. In other words, at some time before the 26th of July, 1954, you talked with Peter Grant about a family income policy, didn't you?

A. Quite evidently.

Q. Your answer, please? A. Yes.

Q. Now, Mr. Price, it is a fact, is it not, that you were the first one who mentioned family income to Mr. Grant? A. Yes, sir.

Q. Until you explained to him what family income meant the man had never heard of it in his life, had he?

A. I can't testify to that.

Mr. Walsh: That would be calling for his conclusion and opinion on something he knows nothing about. Object to it.

The Witness: I can't say on that. He told me——

Mr. Walsh: Just a moment, please, Mr. Price.

The Court: He says he can't say that; he doesn't know. So——

Mr. Walsh: All right.

Mr. Boyle: Q. Well, Peter Grant had never asked you about it, had he, until you mentioned it?

A. But you mentioned had he—— [186]

The Court: Just answer the question. Don't argue with counsel.

The Witness: I beg your pardon, sir?

Mr. Boyle: Q. Peter Grant had never asked you about family income until you mentioned it to him? A. Correct.

(Testimony of George Price.)

Q. Mr. Price, I will show you Plaintiff's Exhibit D.

Counsel, that is letter dated July 20, 1954.

On what date did you receive that letter from your district office?

A. Approximately a few days later, say the 23rd or so.

Q. And what date did you return it to your district office?

A. I can't recall that at this moment.

Q. The instructions on the letter read, "Reply before 7/31. Return this letter with reply."

Is it your recollection that you complied with that instruction? A. Yes, sir.

Q. I will show you Defendant's Exhibit F, a letter dated July 30, 1954. Referring to the date of that letter, about when did you receive this letter from your district office?

A. It is usually within one or two days. It is dated July 30th. Has to come from San Francisco to Monterey and then to me, and en route it would take at least three or four days.

Q. Now, you showed this letter to Mr. Grant?

A. Yes, sir.

Q. Before August 10, 1954, did you not?

A. Yes, sir.

Q. As a matter of fact you showed this letter to him early in August, '54? A. Yes, sir.

Q. Mr. Price, on the evening of August 10, 1954, when you were at the Grant home, did you have your rate books with you? A. Yes, sir.

(Testimony of George Price.)

Q. Did you consult them? A. Yes, sir.

Q. Did you also have in mind the instructions contained in the letter of July 30, 1954?

A. Yes.

Q. In respect to the extra premium for the family income benefit on an aviator?

A. Yes, sir.

Q. And did you also have in mind the letter of July 20, 1954, which says (reading):

“It has been determined that we can consider your prospect for insurance with a basic extra annual aviation premium of \$20.00 per \$1,000.”

Did you have that in mind on August 10th?

A. I had that in mind, sir.

Q. And that evening you made some computations, didn't you, [188] Mr. Price?

A. A few approximate computations.

Q. And after making those computations you asked Mr. Grant for a check in the sum of \$53.36, did you not? A. Yes, sir.

Mr. Boyle: No further questions, Your Honor.

Redirect Examination

Mr. Walsh: Q. Mr. Price, I show you Plaintiff's Exhibit No. 2, which is the receipt dated August 11, 1954. On the back of that appears some figures. Do you know whose handwriting that is?

A. I couldn't tell you, sir. I don't know whether it is mine or not. I don't know.

Q. Well, can you tell from the——

A. It doesn't look like my numbers.

(Testimony of George Price.)

Q. Doesn't look like your numbers. The figures appear here, "\$15.05, \$53.66," and then a total of \$68.71. Does that mean anything to you?

A. I can't recall, sir.

Mr. Walsh: May I have a word with counsel, Your Honor?

(Discussion between counsel out of hearing of the reporter.)

Mr. Walsh: Counsel just informs me, your Honor, that these figures on the back were written by Mrs. Grant in figuring out the monthly premium of \$15.05, plus \$53.66, making [189] a total of \$68.71.

Mr. Boyle: Mrs. Grant was trying to determine——

Mr. Walsh: I just want to know whether those figures are correct.

Mr. Boyle: Well, the figures are correct. But she had in mind the monthly premium under the policy in force, which was \$15.05.

Mr. Walsh: You mean the policy that had been issued in 1950?

Mr. Boyle: We could put the policy in evidence, if you wish. You will note the monthly premium, \$15.05.

The Court: What difference does it make?

Mr. Boyle: And as a good housewife, she wanted to know how much they were going to pay in insurance every month, so she made the computation.

The premium on the policy then in force, \$15.05, plus the premium on the policy which Mr. Price

(Testimony of George Price.)

was selling, and she just happened to write \$53.66 instead of \$53.36, and then she knew they would have \$68.00 every month to shell out.

The Court: Well, all right.

Mr. Walsh: Q. Did you, or did you not, know at that time, Mr. Price, what the whole first premium would be on the type of policy applied for?

Mr. Boyle: Objection——

A. Not exactly. [190]

Mr. Boyle: Self-serving declaration.

The Court: Yes, it is.

Mr. Boyle: Hearsay.

The Court: I will sustain the objection.

Mr. Walsh: Q. Did you, Mr. Price, see Mrs. Kenny, then Mrs. Grant, make any calculations on the back of that receipt?

A. I can't recall anything she wrote personally.

Q. At the time the application was signed, Plaintiff's Exhibit 1, was that receipt attached to it?

A. Yes, sir, attached to the bottom of it.

Q. Attached to the bottom?

A. To that application.

Q. To the corner of Part A? A. Yes.

Q. And did you fill in that receipt before or after it was detached from the application?

A. After—you mean to sign the application? Did he sign it first?

Q. I will withdraw the question.

The application, Part A, was signed by Peter Grant after he had read it over, isn't that right?

(Testimony of George Price.)

A. That is right.

Q. Then you signed as a witness?

A. Yes.

Q. At that time was the receipt still attached to the [191] application? A. Yes, sir.

Q. All right. And subsequently, when you wrote out the receipt, was it still attached to the application, when you filled in the receipt?

A. It was attached until I received his check.

Q. When you filled in the receipt it was still attached to Part A of the application?

A. That is right.

Q. And after you wrote it out you detached it, and to whom did you give it?

A. Well, I can't recall just who I gave it to, but I just tore it off and, to the best of my recollection, I think I put it on the table—on the coffee table, or whatever they call it.

Q. At that time did either Mr. or Mrs. Grant have that other policy there?

A. On hand? I don't think so, at that moment. I didn't see any other contract there, then. I can't recall exactly.

Mr. Walsh: Maybe we can clear this up. Can I speak to counsel a moment?

(Discussion between counsel out of hearing of the reporter.)

Mr. Walsh: Just trying to save time, Your Honor.

Mr. Boyle: Stipulate, Counsel, if Mrs. Kenny were called [192] to testify she would state it is

(Testimony of George Price.)

her best recollection she wrote on it the night after Mr. Price left.

Mr. Walsh: After he had left?

Mr. Boyle: Yes.

Mr. Walsh: That is all.

Mr. Boyle: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Walsh: Mr. Svendsen.

JONAS SVENDSEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Q. Please state your name and occupation for the record.

A. Jonas Svendsen, chief underwriter, Metropolitan Life Insurance Company.

Mr. Boyle: Q. May I have that name spelled?

A. I don't blame you.

Mr. Walsh: S-v-e-n-d-s-e-n.

Direct Examination

Mr. Walsh: Q. You are an employee of the Metropolitan Life Insurance Company, Mr. Svendsen?

A. Yes, sir.

Q. And in what capacity are you employed?

A. I am the chief underwriter.

Q. At the Pacific Coast head office?

A. At the Pacific Coast head office.

Q. How long have you been chief underwriter there?

(Testimony of Jonas Svendsen.)

A. In the capacity of chief underwriter since September of 1945.

Q. Were you with the Metropolitan before that?

A. Yes, sir.

Q. In what capacity and for how long?

A. I started to work on February 23, 1921, in the capacity of mail boy, and then was put into the underwriting department and worked in various capacities, junior underwriter, right on up right 'til 1945 when I was made chief underwriter.

Q. And how long have you been in the underwriting business?

A. Well, I served about four months, four or five months as a mail boy, and was put into the underwriting department, and I have been there pretty close to 36 years, now, in the underwriting department.

Q. I will show you Plaintiff's Exhibit 1 and ask you to take a look at that. That is a partially completed application signed by Peter Grant, dated August 11, 1954, and signed, actually, on August 10, 1954. Is that a complete or incomplete application?

Mr. Boyle: Objection, Your Honor. The document is the best evidence. It is incompetent, irrelevant and immaterial; [194] self-serving; hearsay.

The Court: The objection will be sustained.

Mr. Walsh: Q. What plan of insurance does that call for?

Mr. Boyle: Objection, Your Honor. The document itself is the best evidence.

(Testimony of Jonas Svendsen.)

The Court: Objection will be sustained.

Mr. Walsh: Q. Mr. Svendsen, does the document, itself, show in ordinary language what plan of insurance is applied for?

Mr. Boyle: Objection, Your Honor—same reason.

The Court: Objection will be sustained.

Mr. Walsh: Q. In the course of your duties as an underwriter, chief underwriter, Mr. Svendsen, if that application had been completed would it have come to your division?

A. That is right.

Mr. Boyle: Objection, Your Honor. Move to strike the answer.

Mr. Walsh: I fail to see the basis of these objections.

The Court: The objection will be sustained. I don't think it is material. I have let the record be encumbered with a great many objections on both sides here that I should have sustained, and now I am going to start to rule the way I think I should rule, without taking them under advisement.

We will go on from there. Go ahead. [195]

Mr. Walsh: May the witness answer?

The Court: No.

Mr. Walsh: Well, Your Honor, we have an issue in this case, put in issue by the plaintiff, through oral testimony that was allowed on the plaintiff's side, evidence went far beyond the matters of negotiations and explanations. I made objection at that time, and the evidence was admitted. Now, if we are not entitled to introduce evidence to present

(Testimony of Jonas Svendsen.)

our side of the case we are precluded from a proper defense of this action.

The Court: I think I have ruled correctly.

Mr. Walsh: Q. Mr. Svendsen,—

The Court: I think a great many of your objections in the final outcome of this case will be sustained, too.

Mr. Walsh: I beg your pardon, Your Honor?

The Court: I think a great many of your objections, as I received them in evidence with reservation, I think your objections will be sustained.

Mr. Walsh: Well, in view of the fact that the evidence is brought in, Your Honor, we have got to produce it now.

The Court: I think I will rule on all these questions from now on the way I see it, and not encumber the record with a lot of objections that I will have to rule on later.

Mr. Walsh: Q. Mr. Svendsen, I will show you Defendant's Exhibit D. That is the letter of July 20, 1954. This letter [196] was sent from your department to the Monterey district office, was it not?

A. Yes, sir.

Q. That was in response to an inquiry about the extra basic aviation premium?

A. Yes, sir.

Q. Does that premium appear in the rate book?

Mr. Boyle: Objection, Your Honor, as not the best evidence.

Mr. Walsh: Now, if Your Honor please, this is proper evidence. Counsel inquired of Mr. Price if

(Testimony of Jonas Svendsen.)

He had his rate book with him on the night of August 10th; if he had made calculations. And I think we are entitled to show that certain things that do not appear in the rate book an agent is unable to quote without obtaining that information.

The Court: During the trial of this case I have come to the conclusion that the issues are very narrow, and it is immaterial. The objection will be sustained.

Mr. Walsh: Q. Mr. Svendsen, can you tell us if that Exhibit 1 you have in your hand, the application, had been completed on Part B and Part C, and had been received in your department? And assuming that the plan of insurance applied for was whole life family income, with the income of \$10.00 per month per thousand, permanent insurance to be \$10,000. And if you had received a check for \$53.36, would the [197] application have been approved?

Mr. Boyle: Objection;—

A. No, sir.

The Court: Just a minute.

The answer may be stricken.

Mr. Boyle: Immaterial. Calling for an opinion and conclusion of the witness. Self-serving. Hearsay. Speculative.

The Court: Objection will be sustained.

Mr. Walsh: Q. If, Mr. Svendsen, that application had been completed, Parts A, B, and C, as it calls for, and if it had been approved, what would be the first full month's premium?

(Testimony of Jonas Svendsen.)

Mr. Boyle: Objection, Your Honor. The same objection as made to the last question stated by counsel.

Mr. Walsh: That goes to the very gist of this case, Your Honor. We are entitled to show what the full first premium would have been.

The Court: Objection will be sustained.

Mr. Walsh: Your Honor, I don't quite follow this.

The Court: Well, this Court has made a mistake, in my opinion, in admitting so much testimony where I should have sustained the objection. This whole thing comes right down to the narrow issue, Was the contract completed at the time the receipt was given and the check was paid?

Any statements by witnesses of the insurance company, or [198] anyone else, in connection with what they would have done or what they would have charged, or anything in that respect, I think, is entirely immaterial.

Mr. Walsh: Well, let me say this, first:—

The Court: You have some objections in the record that are good.

Mr. Walsh: Well, I think it is material on the issues of this case to show whether or not there was a completed application. The plaintiff is claiming that all they have to do is to sign Part A.

The Court: That is just the question on the application, itself. The application shows just what was done, and it shows what part of it was not completed, and I don't see any necessity of someone

(Testimony of Jonas Svendsen.)

else trying to interpret this contract. I think it is for the Court to interpret.

Mr. Walsh: Well, we come to the matter of the premium, Your Honor. Now, evidence was allowed on the part of the plaintiff to testify that she was told by the agent that \$53.36 was the full first premium.

The Court: That testimony was all between the agent and the parties involved.

Mr. Walsh: Yes.

The Court: This party wasn't there, and anything that he might have decided as to what would be done with this application, or anything, is not material. [199]

Mr. Walsh: Well, I think this would be relevant, Your Honor: The information to be obtained on the extra aviation premium had to come from Mr. Svendsen. Now, we have an application here where it is a very difficult thing for an agent to calculate a premium because, in the first place, the applicant wanted to pay on a monthly basis. There is a certain part of this combination policy for which the premium is set forth in the rate book. You can look up age 35, whole life family income providing \$10.00 per thousand per month income, and you can find the annual, semi-annual, quarterly, and monthly premiums. But you cannot find in the rate book the quarterly premium for the extra aviation risk, and it can only come from this source. And it was only quoted on an annual basis. And the questions were asked of Mr. Price by counsel if he made

(Testimony of Jonas Svendsen.)

computations, and there you have a situation where the agent is confronted with a difficult thing. And his testimony was that he did the best that he could; that he did not tell the applicant that that was the full first premium. I want to show why, and I want to show what the premium would be, what the correct premium would be, Your Honor, to show that that was not the full first premium.

Now, if it is counsel's position that he is going to rely upon what he has pleaded in his complaint, then there isn't any question about it being a full first premium, because the document merely says the money was paid on account. [200]

If all this testimony is going to be stricken, including Mrs. Kenny's, as to what the agent told her, that's all right.

The Court: I am not going to say at this time.

Mr. Walsh: There will be no evidence before the Court except that there was paid on account a certain amount of money. Now, I think if the Court is going to consider that evidence, then we should be allowed to prove what the full first premium was. Otherwise, I think we are subjected to prejudicial error.

The Court: Well, it might be well for you to have some error in the record. If I were you, I wouldn't complain about having something in the record to overturn the Court on. All I can do is the best I can. If I am wrong, there is a higher court with jurisdiction to straighten me out, and I think I have ruled correctly.

(Testimony of Jonas Svendsen.)

Mr. Walsh: Well, I will ask the question again.

Q. Can you tell me, Mr. Svendsen, what the premium would be on whole life family income, permanent insurance \$10,000, the income to be \$10.00 per month per thousand for 20 years, decreasing term?

Mr. Boyle: Objection, Your Honor—self-serving.

Mr. Walsh: Q. Intermediate class.

Mr. Boyle: Calls for a conclusion and opinion of the witness. Proper foundation had not been laid. All the facts in evidence have not been stated. It is hearsay and self-serving. [201]

The Court: The objection will be sustained.

Mr. Walsh: I have something else that I would like to introduce here, and I think under the California rules this can be done, particularly under the case on which plaintiff relies mostly.

Mr. Boyle: Counsel, please—

Mr. Walsh: I will offer to put in evidence a sample policy that would have been issued had the application have been approved, because the case of Ransom against Penn Mutual [202] made a point of the fact that the defendant did not put into evidence the policy showing the terms and conditions for which the application was made. So upon that authority I am going to ask Mr. Svendsen if—

Would you like to see this, Counsel?

Mr. Boyle: Please.

(Mr. Walsh hands document to Mr. Boyle.)

The Court: You might take a few moments to look that over. We will take a few moments' recess.

(Short recess.)

(Testimony of Jonas Svendsen.)

Mr. Walsh: Q. You have Plaintiff's Exhibit 1?

A. Yes, sir, right here.

Q. Will you turn to Part A of the application where it shows the classification? That's marked "Intermediate"? A. That's correct.

Mr. Boyle: Your Honor, the record here shows there are two marks in "Classification."

Mr. Walsh: It has been testified to that the correct marking was——

The Court: Yes, the marks have been explained.

Mr. Walsh: Q. Does the weight of an applicant, Mr. Svendsen, have anything to do with the classification? A. Yes, sir.

Mr. Boyle: Objection, Your Honor: incompetent, irrelevant and immaterial; self-serving; hearsay; calling for the [203] opinion and conclusion of the witness.

The Court: The answer may be stricken and the objection will be sustained.

Mr. Walsh: Q. Does the weight of the applicant have anything to do with the amount of the premium?

Mr. Boyle: Objection, Your Honor; the same objection made to the last question stated by counsel.

The Court: Objection will be sustained.

Mr. Walsh: Q. Mr. Svendsen, assuming that the applicant was age 35, attains age 35 at the time of the application, and he was approximately six feet two in height, six feet one in his bare feet, and weighed 224 or 225 pounds without his clothing, would he qualify for an ordinary classification?

(Testimony of Jonas Svendsen.)

Mr. Boyle: Objection, Your Honor; same objection as stated to the last question of counsel.

The Court: Objection will be sustained.

Mr. Walsh: Q. If the application, Mr. Svendsen, had been completed and approved for the plan of whole life, family income, with \$10,000 permanent insurance, the income to be \$10.00 per month per \$1,000 at age 35, and the proper first full month's premium had been paid and all of the conditions had been complied with, would the company have issued a policy?

Mr. Boyle: Objection; incompetent, irrelevant and immaterial; hearsay; self-serving; the proper foundation has not [204] been laid; and assumes facts not in evidence.

The Court: Objection will be sustained.

Mr. Walsh: Well, Your Honor, the case of Ransom against Penn Mutual made a point of the fact that the company did not put into evidence the type of policy showing the terms and conditions.

The Court: You have not offered the policy.

Mr. Walsh: Beg your pardon?

The Court: I say, you haven't offered the policy.

Mr. Walsh: I am trying to lay the foundation for it.

The Court: I don't think that answers it. Lay the foundation.

Mr. Walsh: All right.

Q. I show you a sample policy, Mr. Svendsen, and ask you if that is the form of policy that would

(Testimony of Jonas Svendsen.)

have been issued upon the conditions I outlined in the previous question?

Mr. Boyle: Objection, Your Honor. Same objection stated to the previous question.

Mr. Walsh: I will submit the ruling, Your Honor.

The Court: Well, I don't just exactly like the way your question is framed.

Mr. Walsh: Well, I will reframe the question.

The Court: You are putting in the answer to the question that I sustained the objection to. My thought is, maybe—well, perhaps I shouldn't give my thought. You may ask your [205] question. I was about to frame the question for you the way I thought it should be framed. I will let you ask it.

Mr. Walsh: What was your ruling?

The Court: I sustained the objection now, but I think you have a way to put that policy in.

Mr. Walsh: Do you wish me to reframe the question?

The Court: Well, I would suggest—I make this suggestion: This is a Court case, and I suggest you just ask him if this is the type policy that would have been issued if that application had been completed.

Mr. Walsh: Suppose I put it this way:

Q. Had the application been completed and a policy issued, is that the form of policy and does that show the terms and conditions upon which the policy would have been issued?

A. Yes.

Mr. Boyle: Now, may the record show again——

The Court: It may show your objection on the same grounds.

Mr. Boyle: On the same grounds.

The Court: But I will overrule it, and if he wants to offer this policy in evidence now, and he has asked that question, I will admit the policy subject to a later determination as to its admissibility. I am inclined to think it is admissible, but I won't find on it now; I will reserve my ruling. But I will admit it.

Mr. Boyle: Your Honor, this particular form is not [206] merely a sample form. There are matters typed in on the face of this policy that——

The Court: Let me examine it.

Mr. Walsh: Well, naturally it shows the amount of a permanent insurance; it shows the monthly income; and it shows the premium.

Mr. Boyle: This is not a sample policy. In other words, Your Honor, in an effort to get matters into this record that are inadmissible, they have——

Mr. Walsh: I don't know what's inadmissible about trying to defend a case.

The Court: I will admit this policy with the figures that are typewritten in stricken from it, and I will not admit the policy in its entirety with the figures typed in.

Mr. Boyle: Likewise, Your Honor, there is a rider attached to that. I think it is the last page.

The Court: The typewritten portion of that will be stricken, also. The rest is admitted.

Mr. Walsh: One further thing before I offer that: I call Your Honor's attention to the California Insurance Code Section 10113 (reading):

"Every policy of life, disability, or life and disability insurance issued or delivered within this State on or after the 1st day of January, 1936, by any insurer doing such business within this State, [207] shall contain and be deemed to constitute the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, applications, or other writings of either of the parties thereto or of any other person unless the same are endorsed upon or attached to the policies."

Now, I should like to call Your Honor's attention to this. Perhaps you can find it for me, Mr. Svendsen, more quickly—the provision in here about the policy and the application shall constitute the entire contract (handing document to the witness).

The Witness: It is under Clause 8 here, Mr. Walsh, I think—under Paragraph 8, and the subtitle "The entire contract." I think that's what you have reference to.

Mr. Walsh: On page 3 under "Provisions and Benefits," No. 8 (reading):

"Entire Contract. This policy and the application therefor, a copy of which is attached hereto, as a part hereof, constitute the entire contract between the parties, and all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall

avoid this policy or be used in defense of a claim hereunder unless it is contained in the [208] application therefor, and a copy of such application is attached to this policy when issued.”

Q. Now, Mr. Svendsen, what parts of the application are attached to the policy and made a part thereof under that provision?

Mr. Boyle: Objection, Your Honor. The same objection as stated to the previous questions put to this witness.

The Court: Objection will be sustained.

Mr. Walsh: I have made an offer, Your Honor, to introduce the form of policy, and attempted to show that Part A and Part B of the application would be attached to and become a part of the policy, and I again make that offer of proof.

The Court: The objection is still sustained; the offer will be denied.

Mr. Walsh: Very well. No further questions.

Mr. Boyle: Are you going to put the sample in evidence?

Mr. Walsh: No.

Mr. Boyle: No questions, Your Honor.

(Witness excused.)

The Court: Call your next witness.

Mr. Walsh: The defense rests, Your Honor.

(Thereupon the Defendant rested its case in chief.)

Mr. Boyle: Your Honor, may the record show that counsel for the defense did not place the sample policy in evidence, [209] though the Court indicated it was admissible and the offer was made?

Mr. Walsh: Let the record show that I made an offer to put into evidence the policy that would have been issued had the certain terms and conditions been complied with, but the offer was refused by the Court.

The Court: No, I didn't refuse that offer. The record is clear on it, that I told you you could introduce that sample policy if the typewritten portions of it that were filled in were stricken. But the form could be admitted. That was the Court's ruling.

Anything further?

Mr. Walsh: I will offer it, then.

The Court: It may be admitted subject to the same ruling that I made.

The Clerk: Defendant's Exhibit H in evidence.

(The form of policy referred to was received in evidence and marked Defendant's Exhibit H.)

The Court: I will reserve my ruling on the admissibility of it.

Mr. Boyle: May it please Your Honor, the plaintiff has no rebuttal.

(Whereupon, following colloquy between the Court and counsel on the manner of submission, the matter was submitted on briefs, 30, 30 and 15.) [210]

STIPULATION TO AUGMENT RECORD

On Tuesday, June 25, 1957, Mr. Burton L. Walsh and Mr. J. J. Quigley appeared before Hon. Chase

A. Clark in chambers and the following proceedings were had.

Mr. Walsh: Mr. Boyle and I were both under the impression that Mr. Price had testified that after Grant signed the application on August 10th he then took it to Dr. Blaisdell, the examining physician, then picked it up from him at Dr. Blaisdell's office sometime before August 20th. But in looking through the transcript, we cannot find that in there, and if we could augment the record by stipulation we would appreciate it.

We were both under the impression, and there is no question about it, that Plaintiff's Exhibit 1, the application, was taken by Mr. Price to Dr. Blaisdell's office.

The Court: All right.

Mr. Walsh: Will you add that to the record as an augmentation of the record in these words:

"After August 10, 1954, Mr. Price took the Plaintiff's Exhibit 1 to Dr. Blaisdell's office and left it there, and then Mr. Price picked it up after Mr. Grant's death, and some time before August 20, 1954, and sent it to Mr. Wigham."

The Court: That is the way I understood it, anyway.

Mr. Walsh: That was orally agreed to over the telephone this morning between Mr. Boyle and myself.

The Court: You can enter that as a stipulation.

[Endorsed]: Filed September 11, 1957.

[Endorsed]: No. 16130. United States Court of Appeals for the Ninth Circuit. Metropolitan Life Insurance Company, a corporation, Appellant, vs. Margaret L. Grant, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: August 7, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16130

METROPOLITAN LIFE INSURANCE COM-
PANY, a corporation, Appellant,

VS.

MARGARET L. GRANT, Appellee.

APPELLANT'S CONCISE STATEMENT OF
THE POINTS ON WHICH IT INTENDS
TO RELY ON THE APPEAL AND ITS
DESIGNATION OF ALL OF THE RECORD
WHICH IS MATERIAL TO THE CON-
SIDERATION OF THE APPEAL

I.

Concise Statement of the Points on Appeal
The appellant, Metropolitan Life Insurance Com-

pany, intends to rely on the following points on appeal:

1. The final Judgment heretofore entered in the Court below is against the law.

2. The evidence is not sufficient to support said Judgment and said Judgment is against the evidence.

3. The Court erred in finding as a fact in Finding of Fact No. II that "Plaintiff is * * * the beneficiary named in the contract of insurance sued upon."

4. The Court erred in finding such broad facts of agency in Finding No. IV.

5. All of Finding No. V, except the first sentence, is erroneous and is not supported by the evidence.

6. Finding No. VI is erroneous and contrary to the evidence.

7. Finding No. VII is erroneous and contrary to the evidence.

8. Finding No. VIII is erroneous and contrary to the evidence and does not fully and fairly state the facts as to what occurred on August 10, 1954.

9. Finding No. IX is clearly erroneous and contrary to the evidence and states conclusions and not facts.

10. Finding No. X is erroneous and not supported by the evidence and states conclusions and does not fairly state the facts for the period of time it covers.

11. Finding No. XI is erroneous in that it states matters, after the first line, that are irrelevant to the issues here and relate to the first cause of action which was dismissed.

12. Finding No. XII is erroneous and not supported by the evidence.

13. The Court erred in failing to make any finding on a material issue, namely, that on August 14, 1954 Defendant returned Peter Grant's check for \$53.36 to Margaret L. Grant and she accepted it and no tender has ever been made of any amount of money since then to the Metropolitan Life Insurance Company on account of this Application for insurance.

14. The Court erred in failing to make any finding on a material issue, namely, that before August 10, 1954 Metropolitan Life Insurance Company notified Peter Grant in writing that it could make no definite offer to insure him until the completed Application, including the medical examination, and also a Mercantile report, "have" been "viewed" by the Chief Underwriter at the Metropolitan's Pacific Coast Head Office in San Francisco.

15. The Court erred in failing to make any finding on a material issue, namely, that on August 10, 1954 at the time Part A of the Application was signed by Peter Grant he was told by George Price, soliciting agent for the Metropolitan Life Insurance Company, that "He had to have a medical examination for this insurance."; that "He was to see Dr. Blaisdell."; that Dr. Blaisdell's name was writ-

ten into the Receipt (Plaintiff's Exhibit 2); and that the Plaintiff Margaret L. Grant, went to Dr. Blaisdell's office on August 12, 1954 and made the appointment for her husband Peter Grant to see Dr. Blaisdell on August 13, 1954 at 3:30 p.m.

16. The Court erred in failing to make a finding on a material issue, namely, that Peter Grant did not submit to nor have a medical examination by Dr. Blaisdell, the Medical Examiner for the Metropolitan Life Insurance Company, or any other of the company's Medical Examiners for the insurance applied for and on August 13, 1954 said Application in its present form (Plaintiff's Exhibit 2) was in the possession of Dr. Blaisdell.

17. The Court erred in failing to make a finding on a material issue, namely, "There was no representation made at that time on August 10th by Mr. Price or at any other time as to when this insurance would become effective."

18. Conclusion of Law No. II is erroneous and against the law and not supported by the findings or the evidence.

19. Conclusion of Law No. III is erroneous and against the law and not supported by the findings or the evidence.

20. Conclusion of Law No. IV is erroneous and against the law and not supported by the findings or the evidence.

21. Conclusion of Law No. V is erroneous and against the law and not supported by the findings or the evidence.

22. The Court erred in not granting Defendant's motion to strike the opinion of Dr. Sambuck as to the medical acceptability of Peter Grant as a standard insurance risk on June 8, 1954 and it erred in failing to sustain all other objections by Defendant to Dr. Sambuck's testimony.

23. The Court erred in sustaining Plaintiff's objection to Mr. Price's testimony that he didn't know exactly what the whole first premium would be.

24. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify that the Application, if completed, would have come to his division.

25. The Court erred in granting Plaintiff's motion to strike the testimony of Mr. Svendsen that if the completed Application had been received by him with the payment of \$53.36 the Application would not have been approved.

26. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify what the full first month's premium would be if the Application had been completed and approved.

27. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify as to the amount of premium on the amount and plan of the insurance applied for.

28. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify that the weight of an applicant had anything to do with the classification of the applicant or the amount of the premium.

II.

Appellant's Designation of all of the Record Which
is Material to the Consideration of the Appeal.

1. Petition for Removal from the Superior Court
of Santa Cruz County, with copy of Complaint and
Summons attached;
2. Bond on Removal;
3. Notice of Defendant of Petition for Removal;
4. Answer of Defendant;
5. First Amended Complaint;
6. Answer to First Amended Complaint;
7. Order of Dismissal of First Cause of Action;
8. Memorandum Opinion of Court;
9. Excerpt from Docket Entries as follows:
"Mar. 18—Lodged findings & conclusions by
pltff)
"Mar 24—Filed objections of deft. to proposed
findings & conclusions by pltff.";
10. Findings of Fact and Conclusions of Law;
11. Judgment;
12. Notice of Appeal;
13. Supersedeas Bond;
14. Appellant's Designation of Record on Ap-
peal;
15. Order Extending Time to Docket Record on
Appeal;
16. Reporter's Transcript of Trial Proceedings

June 19 and 20, 1957 and Stipulation to augment Record dated June 25, 1957;

17. Stipulation concerning consideration of original Exhibits dated August 13, 1958 and on file herein;

18. Plaintiff's Exhibits: 1, 2, 3, 4, 5 and 6. Only Part A of Plaintiff's Exhibit 1 need be printed in the record. Appellant supplies herewith seven true and correct copies of the entire Exhibit 1;

19. Defendant's Exhibits: A, B, C, D, E, F, G, and H. Defendant's Exhibit H need not be printed in the record. Appellant supplies herewith seven true and correct copies of entire Exhibit H;

20. This Statement of Points on Appeal and Designation of the Record which is Material to the Consideration of the Appeal.

Dated: August 15, 1958.

KNIGHT, BOLAND & RIORDAN,
/s/ BURTON L. WALSH,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION CONCERNING CONSIDERA-
TION OF ORIGINAL EXHIBITS

It is hereby stipulated that each and all of the exhibits herein may be used and considered in their original form by the above entitled Court and the parties to this appeal without said exhibits being printed in the record.

Dated: August 13, 1958.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By PHILIP T. BOYLE,
Attorneys for Appellee

KNIGHT, BOLAND & RIORDAN,
BURTON L. WALSH,

/s/ By BURTON L. WALSH,
Attorneys for Appellant

[Endorsed: Filed August 15, 1958. Paul P.
O'Brien, Clerk.

No. 16,130

IN THE

United States Court of Appeals
For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant,

VS.

MARGARET L. GRANT,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF OF APPELLANT.

KNIGHT, BOLAND & RIORDAN,
BURTON L. WALSH,
JOHN J. QUIGLEY,
444 California Street,
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No. 16,130

IN THE

**United States Court of Appeals
For the Ninth Circuit**

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant,

VS.

MARGARET L. GRANT,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF OF APPELLANT.

STATEMENT CONCERNING JURISDICTION.

This civil action, based upon an alleged contract of insurance, was removed from a Superior Court of California to the U. S. District Court for the Northern District of California, Southern Division, San Francisco, on the grounds of complete diversity of citizenship and the matter in controversy exceeding the sum of \$3,000.00, exclusive of interest and costs. (R. 3-18.) See Title 28 U.S.C. §§ 1441; 1331 and 1332(a) and 1332(a)(1).

The first cause of action of the First Amended Complaint (R. 23-25) was dismissed on May 27, 1957. (R. 34.) The remaining second and third causes of action of the First Amended Complaint and Appellant's Answer thereto (R. 25-34) show complete diversity of citizenship and that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

The statutory provisions sustaining jurisdiction of the District Court are Title 28 U.S.C. §§ 1332(a) and 1332(a)(1).

Thereafter, a Final Judgment was entered (R. 43-45) and an Appeal therefrom was taken by the Appellant herein to this Court. (R. 45.)

The statutory provisions sustaining the jurisdiction of this Court to review the Judgment are Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE.

This is a case of first impression under California law. There is no California case precisely on this situation.

The action was tried on the issues raised by the Second and Third Causes of Action of Appellee's First Amended Complaint and Appellant's Answer thereto. (R. 25-28; 34; 32-34.)

Said action is based on an alleged written contract of insurance purported to have been made between Appellant and Appellee's former husband, Peter Grant, on August 11, 1954, in Watsonville, California,

consisting of a written application and a receipt. (Exhs. 1 and 2; R. 244-244D and 245; see also full size photo of Ex. 1.) Actually, the documents were signed on August 10, 1954. (R. 57-63.)

Appellee alleges in her said Second Cause of Action that Appellant had "previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract." (R. 26.)

Judgment was entered for Appellee requiring Appellant to pay her \$34,000.00 as specified therein, plus interest on installments and costs. (R. 43-45.)

In June, July and part of August of 1954 Appellee and her then husband, Peter Grant, lived in Watsonville, California. He was a crop-duster pilot for the Atwood Crop Dusters of Salinas, California. He and Appellee operated the business in Watsonville. (R. 141.) His annual income was \$15,000.00 per year. (R. 198; Exhibit 1, R. 244C.) He died in the morning of August 13, 1954. (R. 107.) Appellee remarried on November 10, 1956. (R. 128.)

George I. Price was a soliciting agent of Appellant and worked out of Appellant's Monterey District Office as a "detached" agent in the Watsonville area collecting premiums and soliciting new insurance. Insurance business handled by Price came through the Monterey District Office (R. 158) and from there to the head office in San Francisco. (R. 175-176.)

Price called on Grant at his home a number of times during June, July and August (the last being

August 10) of 1954, to discuss insurance. Some of the times Appellee was there, and other times she was not. The dates of the meetings are not clearly within the recollection of Appellee or Price. (R. 129-133; and R. 212, next to last line.) On August 10, 1954, there was the final meeting at Grant's home. Appellee was present. (R. 57-58.) Grant wanted insurance. Price had Appellant's form of application for life insurance with him. He asked Grant the questions contained in Part A of the Application. Grant answered the questions and Price wrote down the answers in his handwriting on Part A of the Application. (R. 58-59.) After Price had filled in Part A of the Application, he had Grant read it over. Then Grant signed Part A and Price signed as a witness to Grant's signature. (R. 217-218.) Margaret L. Grant is named as beneficiary in the application. (Ex. 1, Part A, No. 19(a); R. 244, No. 19(a).) The agent asked for \$53.36. (R. 60.) At the request of Grant, Appellee drew a check for that sum on the Bank of America, Watsonville, California, payable to Appellant. (R. 105.) The Application, Part A of which was filled in by Price and signed by Grant and Price, and dated August 11, 1954, is Plaintiff's Exhibit 1. (Seven actual size photostatic copies of this exhibit have been filed with this Court for its convenience. It is reproduced (but not in actual size or form) in the Record at pages 244 through 244C, inclusive.) The check was dated August 11, 1954, for the reason that, on August 10, 1954, Grant's bank account did not have sufficient funds to cover the check and, at the request of Peter

Grant and Appellee, Price agreed to hold the check until later. Funds sufficient to cover the check were deposited in the account on August 11, 1954. (R. 103.)

At the meeting on August 10, 1954, Price told Grant he would have to have a medical examination for the insurance and that Appellant's examining physician in Watsonville was Dr. Blaisdell. He asked Mr. Grant if he could see Dr. Blaisdell on August 11, 1954, but Grant replied that he was very busy and couldn't make it. Price suggested, inasmuch as Grant was working when he was called upon to do so, depending upon flying conditions and so forth, that he make his own appointment. Price could not get any definite time from Grant as to when he could see the doctor. (R. 72-75.)

Price wrote out a receipt for \$53.36. When he filled it in it was attached to the Application. (R. 218.) In the lower left hand corner of the receipt, following the printing "Appointment for Medical Examination", Price wrote "1st—small office"; following the printed word "Date", he wrote "not Thurs.", and below that he wrote "Dr. Blaisdell". (Ex. 2, R. 245; R. 71-72.)

(*Note:* The correct name is Blaisdell. Variation in spelling was due to use of different reporters in the trial court. "Dr. Blaisdell" and "Dr. Blaisdale" are one and the same person.)

Appellee's own testimony is as follows:

(Mr. Brauer, on direct examination):

"Q. Was anything said in that meeting with regard to a medical appointment?

A. Yes, Mr. Price told Mr. Grant that he would have to go to Dr. Blaisdale and have his physical examination.

Q. What else was said?

A. But that he couldn't go on Thursday because that was Dr. Blaisdale's day off." (R. 105-106.)

On cross-examination by Mr. Walsh she testified:

"Q. On this same occasion, August 10th, did you hear Mr. Price tell Peter Grant that *he had to have a medical examination for this insurance?* (emphasis ours)

A. Yes, I did.

Q. And that he was to go and see Dr. Blaisdell, is that correct?

A. That's correct.

Q. And you yourself, I believe, testified that you went to Dr. Blaisdell's office and made an appointment for your husband to be examined for this insurance, and you made the appointment for him to see Dr. Blaisdell on August 13th of 1954 at 3:30 p.m., is that correct?

A. That's correct.

Q. And you made that appointment on Thursday, the 12th of August?

A. That's correct.

Q. And before Peter Grant went to Dr. Blaisdell for the medical examination for this insurance, he died?

A. That's correct." (R. 130.)

After the receipt was filled in by Price, he gave it to Grant at the time Grant handed the check to him. (R. 105.) The receipt is Plaintiff's Exhibit 2, reproduced at R. 245.

Neither on August 10, 1954, nor at any other time, did Price make any representation as to when insurance would be effective. This fact is likewise established by Appellee's own testimony. She testified on direct examination:

(Mr. Brauer):

"Q. Was anything said at that time as to when coverage was to be effective?

A. No, he didn't say either way." (R. 106.)

On cross-examination she testified:

(Mr. Walsh):

"Q. Thank you. Reading from the deposition of Margaret L. Grant, taken on March 28, 1956, lines 1 to 4, page 80: 'Q. There was no representation made at that time on August 10th by Mr. Price or at any other time as to when this insurance would become effective? A. No.' Do you recall that question?

A. Yes, I do.

Q. And you recall giving that answer?

A. Yes, I do.

Q. Is that your testimony now?

A. Yes." (R. 129-130.)

After August 10, 1954, Price took the application to Dr. Blaisdell's office and left it there. (R. 235.) On August 12, 1954, Appellee made an appointment for her husband for the medical examination by Dr. Blaisdell. She testified concerning this on direct examination:

"Mr. Brauer. Q. Did you do anything with regard to a medical appointment for your husband?

A. Yes. On Thursday I had to take our son up, spent all day in the same building——

Q. Pardon me, I didn't hear you, I'm sorry.

A. On Thursday, which was the 12th, I had an appointment in the same building as Dr. Blaisdale for my oldest boy, and I was there all day, and while I was there I went to the desk and made an appointment for Mr. Grant for Friday. They couldn't take him until 3:30 that afternoon, which would be the 13th." (R. 107.)

On cross-examination Appellee gave similar testimony:

(Mr. Walsh):

"Q. And you yourself, I believe, testified that you went to Dr. Blaisdell's office and made an appointment for your husband to be examined for this insurance, and you made the appointment for him to see Dr. Blaisdell on August 13th of 1954 at 3:30 p.m., is that correct?

A. That's correct." (R. 130.)

On August 14, 1954, the day after Grant died, Price called at the Grant home and returned the check for \$53.36 to Appellee and she accepted it. Since that date no tender of any amount of money has ever been made to Appellant on account of the premium, either by Appellee or her attorneys. (R. 134-135.)

After Grant's death, Price picked up the application (Ex. 1) from Dr. Blaisdell's office and sent it to Appellant's Monterey District Office. (R. 235.) The application was sent from the District Office to Appellant's Pacific Coast Head Office along with a letter dated August 20, 1954. (R. 189-191; Dft's Ex. G.)

FACTS RELATING TO QUESTION OF PRIOR APPROVAL.

In June a "trial application" concerning \$5,000.00 insurance on the "Whole Life Paid-Up at Age 85 Plan" was submitted to the head office. This was on the same type of form as Ex. 1 but was not a regular application for insurance because the word "Trial" was written on the form. (R. 207-208.) This unsigned trial application was sent by the Manager of the Monterey District Office to Appellant's Pacific Coast Head Office with a written request, dated June 28, 1954, for advice as to whether a regular application for such a policy could be submitted and what the extra aviation premium would be. (R. 173-175; Ex. A, R. 250.) Jonas Svendsen, Appellant's Chief Underwriter at its Pacific Coast Head Office (R. 219), replied by letter, dated July 6, 1954 (Ex. B, R. 251), advising that, before a trial application could be given further consideration and the proper aviation premium quoted, it would be necessary to complete Appellant's Aviation Questionnaire and submit it to the Head Office. This letter, as well as all other letters from Appellant's Head Office were sent to the Monterey District Office. (R. 171-191.) An Aviation Questionnaire was completed (Ex. 5, R. 248) and sent from the District Office to the Head Office with a letter dated July 15, 1954. (R. 178; Ex. C, R. 252.) Jonas Svendsen, by letter dated July 20, 1954 (Ex. D), advised the District Office that Appellant *could consider* the prospect for insurance with a basic extra annual aviation premium of \$20.00 per \$1,000.00. This letter stated, in part:

“We suggest, therefore, that if our tentative offer is acceptable that you complete the application, arrange for a medical examination between Mr. Grant and one of the authorized examiners in your territory and order the mercantile report in the usual manner. This must not be construed as a promise to issue as we can make no definite offer until we have viewed the completed papers. If an application is submitted, please refer to this correspondence. We are returning herewith the trial application for whatever disposition you care to make of it.”

This letter of July 20, 1954, was sent by the District Office to Price (R. 182) and was shown by him to Grant (R. 193-194). The trial application was lost. (R. 207.)

Appellant's Monterey District Office, by letter dated July 26, 1954, requested the Head Office to advise of the amount of extra aviation premium on the term element of a policy on “Family Income with Whole Life paid-up at age 85.” The District Office wrote “The prospect is interested in \$5,000.00 on the above plan”. (R. 183-184; Ex. E, R. 254.) Jonas Svendsen wrote to the District Office, by letter dated July 30, 1954, advising of the method to compute the basic extra annual aviation premium on the plan mentioned. Alan Wigham, Manager of Appellant's Monterey District Office, wrote on the bottom of the July 30, 1954, letter as follows:

“\$20.00 for life paid-up at 85 or other plans except Family Income.

For Family Income \$40.00 per \$1,000.00—

With \$1,000.00 and \$20.00 per month \$60.00 per \$1000

Better stick to a straight plan of insurance—no Family Income.” (R. 184-189; Ex. F, R. 255.)

This letter was sent to Price (R. 188) and he showed the letter to Grant (R. 194).

After the death of Grant, the District Office advised the Head Office of the fact by letter dated August 20, 1954, and attached to this letter the application which had been partly filed in on August 10, 1954. (R. 189-191; Ex. G, R. 256.) At the trial, Appellant offered into evidence a form of policy which would have been issued by Appellant if the application had been completed and approved and the full first monthly premium had been paid. It was admitted into evidence with the typewritten portions of it stricken. (R. 229-234; Ex. H.) Appellant has supplied seven true and correct copies of Exhibit H for the convenience of the Court.

**STATEMENT OF QUESTIONS INVOLVED AND THE
MANNER IN WHICH THEY ARE RAISED.**

The questions involved are:

1. Was there a written contract, consisting of Appellee's Exhibits 1 and 2, whereby the life of Peter Grant was insured at the time of his death on the morning of August 13, 1954?
2. Did the Appellant, prior to August 10, 1954, approve, at its home office, the said alleged

contract of insurance for the class, plan and amount thereof?

The manner in which the foregoing questions are raised is as follows:

The facts on which the questions are based appear in the evidence adduced at the trial. The Findings of Fact and Conclusions of Law of the District Court adverse to Appellant and the Judgment of the District Court are erroneous, unsupported by the evidence, and contrary to law.

SPECIFICATION OF ERRORS.

Error No. 1. The Court below erred in rendering the final Judgment heretofore entered (R. 43-45) on the ground that it is against the law.

Error No. 2. The Court below erred in rendering said Judgment (R. 43-45) on the grounds that it is not supported by the evidence and is contrary to the evidence.

Error No. 3. The Court erred in finding as a fact, in Finding of Fact No. II (R. 38), that “plaintiff is . . . the beneficiary named in the *contract of insurance* sued upon”, on the ground that said finding is erroneous and not supported by the evidence, and the term “contract of insurance” is a misplaced conclusion of law. (Emphasis ours.)

Error No. 4. The Court erred in finding such broad agency of Price as set forth in Finding No. IV (R.

39), including the authorization "to take such applications" and "to give *binder* receipts" (emphasis ours) on the ground and for the reason that it is clearly erroneous and, in this particular case, the limitation of authority of the agent is set forth in writing.

Error No. 5. The Court erred in making the following portion of Finding of Fact No. V (R. 39):

"In the course of said period of time and in pursuit of said solicitation the defendant fully informed itself of Peter Grant's needs and desires for life insurance and of his occupation and other factors bearing upon his acceptability as an insurance risk and the terms upon which such risk would be assumed by defendant."

on the ground it is erroneous and is not supported by the evidence.

Error No. 6. The Court erred in making the finding, in Finding No. VI (R. 39):

"At all times herein mentioned up to and including August 13, 1954, Peter Grant enjoyed excellent health and suffered from no disability, infirmity or ailment."

on the ground that such finding is erroneous and contrary to the evidence.

Error No. 7. The Court erred in finding, in Finding of Fact No. VII (R. 39-40), that:

"On or before August 10, 1954, defendant, at its head office, authorized and approved Peter Grant for insurance as to the business in which he was engaged."

on the ground that such finding is erroneous and contrary to the evidence.

Error No. 8. The Court erred in making Finding of Fact No. VIII (R. 40) on the grounds that it is erroneous and contrary to the evidence and does not fully and fairly state the facts as to what occurred on August 10, 1954.

Error No. 9. The Court erred in making Finding of Fact No. IX (R. 40) as follows:

“Plaintiff and Peter Grant and each of them at all times construed the application and the binder receipt as effecting a contract of insurance upon the life of Peter Grant in accordance with the terms set forth in said documents immediately upon signing Part A of said application and delivery of said sum of \$53.36. Said construction was reasonable.”

on the ground that the facts stated therein are clearly erroneous and contrary to the evidence and the finding contains conclusions of law.

Error No. 10. The Court erred in making Finding No. X (R. 40-41) as follows:

“At no time prior to the death of Peter Grant did the defendant perform any act or communicate an intention to rescind or terminate said contract of insurance.”

on the grounds and for the reason that said finding is unnecessary and immaterial and is not supported by the evidence.

Error No. 11. The Court erred in finding as a fact that portion of Finding No. XI (R. 41) that Peter

Grant died “solely as the result of an accident while engaged in his occupation hereinbefore mentioned.” because said finding is erroneous and not supported by the evidence and is not an issue in this case.

Error No. 12. The Court erred in finding that portion of Finding No. XII (R. 41) which reads “Said contract of insurance provided” because said finding is erroneous and not supported by the evidence and also because said finding is a misplaced conclusion of law.

Error No. 13. The Court erred in failing to make any finding on a material issue, as set forth in Paragraph 13 at page 238 of the Record.

Error No. 14. The Court erred in failing to make any finding on a material issue, as set forth in Paragraph 14 at page 238 of the Record, on the grounds that such a finding is supported by the evidence and is material to the issues in this case.

Error No. 15. The Court erred in failing to make a finding on a material issue, as set forth in Paragraph 15 at pages 238 and 239 of the Record, on the grounds that such a finding is supported by the evidence and is material to the issues in this case.

Error No. 16. The Court erred in failing to make a finding on a material issue, as set forth in Paragraph 16 at page 239 of the Record, on the grounds that such a finding is supported by the evidence and is material to the issues in this case.

Error No. 17. The Court erred in failing to make a finding on a material issue, as set forth in Para-

graph 17 at page 239 of the Record, on the grounds that such a finding is supported by the evidence and is material to the issues of this case.

Error No. 18. The Court erred in its Conclusion of Law No. II (R. 41-42) as follows:

“On August 10, 1954, a contract of insurance upon the life of Peter Grant was entered into between Peter Grant and the defendant, said contract was dated August 11, 1954, and was to take effect on said date. The provision in said contract with regard to approval of the risk at the defendant’s home office was a condition subsequent; i.e. Peter Grant was insured from the date of the contract subject to the right of the defendant during the life time of the insured to return the premium paid and to communicate its disapproval of the risk and thereby to terminate the contract.”

on the grounds and for the reason that it is erroneous and against the law and is not supported by the evidence.

Error No. 19. The Court erred in its Conclusion of Law No. III (R. 42) as follows:

“Said contract was in full force and effect on August 13, 1954, the date of Peter Grant’s death.”

on the grounds and for the reason that it is erroneous and against the law and is not supported by the evidence.

Error No. 20. The Court erred in its Conclusion of Law No. IV (R. 42) as follows:

“Plaintiff and Peter Grant have each performed all the terms and conditions of said contract by each agreed to be performed.”

on the grounds that it is erroneous and against the law and is not supported by the evidence.

Error No. 21. The Court erred in making Conclusion of Law No. V (R. 42-43) in concluding that the defendant was obligated to pay any money to plaintiff, on the grounds that there was no contract under which the defendant was obligated to pay anything to the plaintiff and on the grounds that said conclusion is erroneous and against the law and is not supported by the evidence.

Error No. 22. The Court erred in not granting defendant's motion to strike the opinion of Dr. Sambuck as to the medical acceptability of Peter Grant as a standard insurance risk on June 8, 1954, and it erred in failing to sustain all other objections by defendant to Dr. Sambuck's testimony. The grounds urged for the objection and the full substance of the evidence admitted are as follows (R. 119):

“Mr. Brauer. Q. After making this examination, will you state what those findings were with regard to the health of Peter Grant at that time?

Mr. Walsh. Just a moment.

Mr. Brauer. Q. Based on your examination?

Mr. Walsh. I think that is immaterial, Your Honor, as to what the condition of his health was on June 8th, 1954.

The Court. I will make the same ruling I have made on the admission of other testimony.

I will let it in and I will rule on its admissibility later.

Mr. Brauer. Q. You may answer the question.

A. I found him in good physical health."

Dr. Sambuck testified that he had acted as a medical examiner for several life insurance companies. Then the following testimony was elicited (R. 120-122):

"Q. Now and as such, you have had occasion, have you not, to determine the medical acceptability of an applicant for life insurance. Now, based on your examination of Peter Grant, on June 8th, and on your experience as a life insurance medical examiner, do you have an opinion as to whether Peter Grant was, on June 8, 1954, a medically standard insurance risk?

A. Yes.

Mr. Walsh. Just a moment, please. I ask that that answer be stricken, because the question is not involved here as to whether on June 8th of 1954 this man, this applicant, would have been eligible, and furthermore, the hypothetical question does not take into consideration all the facts and issues in the case; and for the further reason that it is anticipating something that is not in evidence.

The Court. I will let him answer this question. Just yes or no.

A. Yes, sir, I do.

Mr. Brauer. Q. The question was merely whether you had an opinion.

The Court. That's right, let him answer.

A. Yes, sir.

Mr. Brauer. Q. Will you state your opinion?

A. In other words, if I had examined him for

an insurance company, I would have passed him. I would have okayed him.

Mr. Brauer. Now, may I have Exhibit 1, please?

Q. Dr. Sambuck, I show you Exhibit 1 in evidence and call your attention to parts B and C thereof and ask you whether you, at my request, have, during the past few days, looked at an exact copy of that part B and C?

A. I didn't get you——

Mr. Walsh. Just a moment, please.

Mr. Brauer. May I proceed, counsel?

Mr. Walsh. If your Honor please, I would like to move to strike out the opinion this doctor has given upon the grounds stated. As I understand your ruling, it was he could state whether or not he had an opinion.

The Court. Yes, that's right.

Mr. Walsh. Now I ask that the opinion that he gave in response to the next question be stricken, because obviously it does not relate to the time of the application and was an answer to the question that calls for his conclusion, and did not include the facts involved in this case.

The Court. I will reserve my ruling on that until I take the full case."

Error No. 23. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter of Appellant, to testify that the application, if completed, would have come to his division. The full substance of the evidence rejected and the grounds urged are as follows (R. 221-222):

"Mr. Walsh. Q. In the course of your duties as an underwriter, chief underwriter, Mr. Svend-

sen, if that application had been completed would it have come to your division?

A. That is right.

Mr. Boyle. Objection, Your Honor. Move to strike the answer.

Mr. Walsh. I fail to see the basis of these objections.

The Court. The objection will be sustained. I don't think it is material. I have let the record be encumbered with a great many objections on both sides here that I should have sustained, and now I am going to start to rule the way I think I should rule, without taking them under advisement.

We will go on from there. Go ahead.

Mr. Walsh. May the witness answer?

The Court. No.

Mr. Walsh. Well, Your Honor, we have an issue in this case, put in issue by the plaintiff, through oral testimony that was allowed on the plaintiff's side, evidence went far beyond the matters of negotiations and explanations. I made objection at that time, and the evidence was admitted. Now, if we are not entitled to introduce evidence to present our side of the case we are precluded from a proper defense of this action.

The Court. I think I have ruled correctly."

Error No. 24. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter of defendant, to testify in response to merely preliminary questions concerning the weight and height of an applicant. The full substance of the evidence rejected and the proceedings are as follows (R. 228):

"Mr. Walsh. Q. You have Plaintiff's Exhibit 1?

A. Yes, sir, right here.

Q. Will you turn to Part A of the application where it shows the classification? That's marked 'Intermediate'?

A. That's correct.

Mr. Boyle. Your Honor, the record here shows there are two marks in 'Classification'.

Mr. Walsh. It has been testified to that the correct marking was——

The Court. Yes, the marks have been explained.

Mr. Walsh. Q. Does the weight of an applicant, Mr. Svendsen, have anything to do with the classification?

A. Yes, sir.

Mr. Boyle. Objection, Your Honor: incompetent, irrelevant and immaterial; self-serving; hearsay; calling for the opinion and conclusion of the witness.

The Court. The answer may be stricken and the objection will be sustained."

ARGUMENT.

1. APPELLEE FAILED TO PROVE THAT A WRITTEN CONTRACT OF INSURANCE WAS IN FORCE AND EFFECT ON AUGUST 13, 1954, AT THE TIME OF GRANT'S DEATH.
- A. An application for insurance amounts to a mere offer to enter into an insurance contract.

It is well settled that a contract requires the mutual consent of the parties or, as sometimes stated, a meeting of minds. The required meeting of minds occurs when one party makes an offer which is accepted by the other party according to its terms. The courts of

California have had occasion to discuss these fundamental principles. In *Linnastruth v. Mutual Benefit Assn.* (1943) 22 C.2d 216, at 219, 137 P.2d 833, at 834, the California Supreme Court said:

“An application for insurance is a proposal. A meeting of minds is essential. And the proposal is not a completed contract until it is accepted by the insurer in the same terms in which the offer was made. If the acceptance modifies or alters any of the terms of the proposal, it must in turn be accepted by the applicant to be effective as a contract.”

In *Burch v. Hartford Fire Ins. Co.* (1927) 85 C.A. 542, 259 P. 1108, the Court had under consideration an application for crop insurance which provided that the insurance applied for would not be binding until the application was approved and a policy delivered. The Court said:

“Under such circumstances the application is but one of the purposes or steps leading to a contract of insurance. It requires action on the part of the insurer, to whom the application is made, before a binding contract can be created. In other words, there must be a meeting of the minds or a meeting of the mind of the applicant and the insurer.”

The fundamental requirement in all contracts, including insurance contracts was stated in a practical way by a California court in *Standard Accident Ins. Co. v. Pratt* (1955) 130 C.A.2d 151, 278 P.2d 489. This case involved a suit for declaratory relief on an automobile

liability policy which involved alleged misrepresentations in the application. At page 155 the court said:

“In 14 Cal. Jur. 422 it is said that the application is the proposal for insurance, and it is in reliance upon the facts stated in the application that the policy is usually issued and that an application is nothing more than a representation by a party when he applies for insurance.”

The court, in *K.C. Working Chemical Co. v. Eureka-Security Ins. Co.* (1947) 82 C.A.2d 120, 185 P.2d 832 which involved two fire insurance policies, discussed the contractual aspects of insurance contracts at some length, citing many authorities. At page 131 the opinion states:

“Until an application for insurance is accepted no contractual relation exists between an applicant for insurance and an insurance company (authorities cited). An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason or arbitrarily (authorities cited). A mere intention or mental determination on the part of the insurer to accept the application is not of itself sufficient to effect a binding contract (authorities cited).” (See also *Mutual Life Ins. Co. v. Young* (Calif. case) 90 U.S. 85, 106, 23 L.Ed. 152.)

These principles of contract are of fundamental importance and govern the decision in this action.

B. The application is one document but has several parts.

An examination of the application discloses that it is in pamphlet form and consists of four pages, three of which are entitled Parts A, B and C, respectively.

Appellant's witness, Alan Wigham, testified that the application (Ex. 1) is the form of application customarily used by the Company; that the writing agent completes Part A of the application; that Part A requires the signature of the applicant; that, after Part A is signed by the applicant, the agent puts the application in the hands of the medical examiner; that the doctor asks the applicant the questions contained in Part B of the application and records the applicant's answers therein; that the applicant is required to sign at the bottom of Part B to complete that part of the application; that the medical examiner fills in the answers to the questions on Part C of the application; that, after the application is placed in the hands of the medical examiner, it is sent by him, when completed, direct to the Appellant's Head Office and that the application would be returned by Appellant's Head Office if not signed by the applicant on both Parts A and B (R. 160-166).

A recent Federal District Court case involved a factual situation similar to that which exists in this action, *Corn v. United American Life Ins. Co.* (USDC, D. Colo.) 104 F.Supp. 612. The Court said, at page 613:

"The Company's application for an insurance policy, which was submitted to Corn for completion, consisted, so far as it is pertinent here, of two printed forms. One of these forms was entitled 'Part One of Application for Insurance'; the other was headed, 'Part Two of Application for Insurance'."

Part One of the application was executed by the applicant and the Court notes that "It contained all the data required by the Company for the issuance of a policy, other than information concerning the health and physical condition of the applicant. Part Two, which was never filled out and which Corn never executed, was a medical or health questionnaire." The applicant never underwent his physical examination and never submitted or completed Part Two of the application for insurance before his death. In deciding that no insurance contract had been created, the Court, at page 615, stated as follows:

"It must also be remembered that Part Two was actually an element of the application for insurance. Surely the parties did not intend coverage to be effected prior to the time it was fully applied for."

An application similar to the one in the instant case was construed by the Court in *Holden v. Metropolitan Life Ins. Co.*, 42 N.Y.Supp. 310; reversed on other grounds (160 N.Y. 647, 58 N.E. 771). Suit was brought to recover on the life insurance policy issued pursuant to the application and the company defended on the grounds of fraud in the application. On appeal the plaintiff took the position that the statements made in the second part of the application were not part of the contract of insurance. The application offered in evidence consisted of, first, questions and answers under the head of "Application to Metropolitan Life Insurance Company" which, at the end, was dated and signed by the applicant. Next came

questions and answers under the head of "Statements Made to the Medical Examiner" which, at the end, contained a statement called a "warranty" signed by the applicant. The Court noted that these statements were apparently on one sheet of paper which was endorsed "Application to Metropolitan Life Insurance Company". The Court rejected the plaintiff's argument that the term "application" as used in the policy included only the first part of the application and did not include the statements made to the medical examiner. The Court said:

"Such application, consisting of several parts, must, I think, be deemed to be the application referred to in the policy, and therefore a part of the contract of insurance." (p. 113.)

In *Mutual Life Ins. Co. v. Hilton-Green*, 241 US 613, 60 L.Ed. 1202, at 241 US 621, 60 L.Ed. 1210, the Supreme Court construed an application consisting of several parts and observed: "The medical examiners' reports are plainly integral parts of application and by apt words the latter become an essential constituent of the policies." See also *Westphall v. Metropolitan Life Ins. Co.*, (1915) 27 C.A. 734, 151 P. 159.

Later herein we shall call particular attention to Appellant's application. It is clear that, so far as the applicant-offeror is concerned, both Part A and Part B must be signed by him and the completion of Parts A, B and C requires action on the part of the applicant.

C. Applicant knew he had to perform a condition precedent before insurance would become effective.

The evidence clearly establishes that Grant knew that a medical examination was required to complete the application for insurance. Price, when filling in Grant's answers to the questions in Part A of the application, had the application open before him. The application, which is four pages in pamphlet form, is always kept intact. (R. 70.) As Price wrote in the answers to the questions in Part A, the whole application was before them and Grant could see it and what was written in Part A of the application; he was sitting to the left of Price. (R. 69-70.) Grant read Part A before he signed it. (R. 217-218.) Hence, he was bound to know there was a Part B. Obviously, Part B pertained to a medical examination. In the upper right hand corner of Part A of the application appears the word "Medical". Throughout the printed matter in Part A of the application, directly above Grant's signature, are references to both Part A and Part B of "this" application.

Paragraph No. 1 says "The statements and answers in Part A and Part B of the application for this insurance shall form the basis of the contract of insurance, if one be issued."

Paragraph No. 2 refers to "medical examiner".

Paragraph No. 3 states "No statement to or by, and no knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the applicant shall be considered as having been made to or brought to the knowledge of the Company

unless stated in *either Part A or Part B* of the application for this insurance.” (Our emphasis.)

Both Parts A and B are entitled “Application to the Metropolitan Life Insurance Company”. Below this heading on Part B appears “Applicant’s Statements to the Medical Examiner”. At the bottom of Part B is a place for “the Signature of Applicant” below a certification which states as follows: “I have read the foregoing answers before signing. They have been correctly written as given by me and are true and complete. There are no exceptions to such answers other than as stated herein”.

There is no question that Grant knew that the application had a Part B as well as a Part A and that a medical examination was required. The general rule is that, when a person with the capacity of reading and understanding an instrument signs it, he is bound by its conditions and is estopped from saying that its provisions are contrary to his intentions or understanding. (*Palmquist v. Mercer* (1954) 43 C.2d 92, 272 P.2d 26; *Curriu v. Curriu* (1954) 125 C.A.2d 644, 271 P.2d 61.)

Grant was told that he had to have a medical examination for this insurance—Price told him this on the evening of August 10, 1954. On the receipt given to Grant, Price filled in under the printing “Appointment for Medical Examination” the words “1st—small office * * * Not Thurs. * * * Dr. Blaisdell”, explaining to Grant and Appellee that Dr. Blaisdell was Appellant’s medical examiner, the location of his

office, and that the doctor was not in the office on Thursdays. That the parties clearly understood this is demonstrated by what happened on August 12, 1954. Appellee, Margaret Grant, testified on direct and cross-examination that, on that date, she made an appointment at Dr. Blaisdell's office for Mr. Grant to have his medical examination on August 13, 1954, at 3:30 in the afternoon. (R. 107, 130.)

The construction placed on a contract by evidence of the acts and conduct of the parties before any controversy has arisen as to its meaning is entitled to great weight.

Flax v. Prudential Life Ins. Co. of America
(S.D.Calif. 1957) 148 F.Supp. 720;

Nicolaysen v. Pacific Home (1944) 65 C.A.2d
769, 151 P.2d 567;

Whalen v. Ruiz, 40 C.2d 294, 253 P.2d 457;

Corn v. United American Life Ins. Co., supra.

D. The evidence is undisputed that the application was not completed.

It is obvious from an examination of the application (Plf's Ex. 1, seven true and actual photostatic copies of which have been furnished to this Court) that the application was not completed by Grant. The only portion of the application which was filled in is Part A. At the time of death of Grant, the application was in the possession of Appellant's medical examiner in Watsonville, Dr. Blaisdell (R. 235), waiting for completion of Parts B and C.

Under California law there can be no insurance in force in such a situation.

Ransom v. Penn Mutual Life Ins. Co., 43 C.2d 420, 274 P.2d 633.

E. The language in Part A of the application and in the receipt does not create a contract for immediate insurance.

The District Court held that a contract of insurance was entered into between Appellant and Grant on August 10, 1954, said contract to take effect on August 11, 1954, and held that said contract was in full force and effect on August 13, 1954, the date of Grant's death. (R. 41-42.) In so doing, the District Court misconstrued the evidence and the law applicable to the evidence.

The law requires that every part of the contract be given effect and that the intention of the parties must be gathered from the whole thereof and not from an isolated or detached portion of the contract.

New York Life Ins. Co. v. Hiatt (9th Cir. 1944)
140 F.2d 752;

New York Life Ins. Co. v. Hollender (1951) 38
C.2d 73, 237 P.2d 510;

Corn v. United American Life Ins. Co., supra;
California Civil Code §1641, which provides as follows:

“EFFECT TO BE GIVEN TO EVERY PART OF CONTRACT. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

The evidence heretofore mentioned given by Appellee, that a medical examination was required "for this insurance", must also be given great weight when applying the rules of interpretation of contracts. Appellant urges that, in reading what is alleged to be a contract of insurance, the Court should consider all of Plaintiff's Exhibit 1, the Application, and all of Plaintiff's Exhibit 2, the Receipt. It seems clear, in considering the whole of these two documents, that no contract for immediate insurance was made.

(1) The parties did not intend immediate insurance.

The evidence establishes that there was no intention of the parties that Peter Grant would be covered by insurance on August 11, 1954.

The primary purpose in construing the writings is to determine and give effect to the mutual intention of the parties as it existed at the time of contracting.

New York Life Ins. Co. v. Hollender, supra;
Thomas v. Buttress & McClellan, Inc. (1956)

141 C.A.2d 812, 297 P.2d 768.

No representations were made by the agent as to when the insurance would become effective. The applicant knew that the application had not been completed and that a medical examination was required. The Appellee herself testified that Price told Grant that he had to have a medical examination for the insurance and she made the appointment for her husband for this medical examination. Her testimony and her conduct in making the appointment for her husband, before any controversy arose, makes the inten-

tion of the parties crystal clear. The evidence concerning the discussion about a medical examination and Mrs. Grant's making the appointment with Dr. Blaisdell warrants only one inference, namely, that she was acting as agent for Peter Grant, her husband, when she made the appointment. Appellee is bound by her testimony which establishes that the applicant knew there was a condition precedent to be performed, which only the applicant himself could perform, i.e., the submission to a medical examination for the insurance.

In *Hutchinson v. Metropolitan Life Ins. Co.* (Mo. 1956) 293 S.W.2d 307, the plaintiff and alleged beneficiary testified concerning the medical examination. The Court observed:

“Plaintiff says that ‘*we* knew they must want it for a reason’ but *she* ‘didn’t think anything about it’. That testimony does not constitute evidence that Mr. Hutchinson did not know and fully understand the purpose and significance of the examination.” (p. 313.)

In the present action Appellee made it clear, by her own testimony, that she understood the purpose and significance of the examination. She testified that Price told Grant, in her presence, that he *had to have* a medical examination *for this insurance*. (R. 130.) Appellee herself has conclusively established the intention of the parties.

(2) Conditions precedent exist which were not performed.

The evidence that Grant knew the application consisted of at least two parts and that he had to submit

to a medical examination, and that an appointment was made by his agent for him to have the medical examination, establishes that Grant understood that more was required of him than just the completion of Part A and accepting the receipt, before insurance became effective. The application was not completed. The medical examination was not taken. Hence, there was nothing that could be approved at the home office.

The language in paragraph 4, just above the signature of Peter Grant in Part A of the application, states:

“4. The Company shall incur no liability under this application until a policy has been delivered and the full first premium specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant, in which case such policy shall be deemed to have taken effect as of the date of issue as recited therein, except as follows: *If* an amount equal to the full first premium on the policy applied for is paid to and accepted by the Company at the time Part A of this application is signed and *if* this application is approved at the Company's Home Office for the class, plan and amount of insurance herein applied for, *then* the insurance in accordance with the terms of the policy applied for shall be in force from the date hereof.” (Our emphasis.)

The language in the receipt is to the same effect, except it adds:

“... *but otherwise* no insurance shall be in force under said application unless and until a policy has been delivered . . .” (Our emphasis.)

and also provides for refund of the premium if the policy is not delivered within 60 days. This language clearly states payment of the *full* first premium as a condition precedent, and *approval* of the application at the Company's Home Office of the class, plan and amount of insurance as further conditions precedent. Approval means what it says.

Kammerer v. Metropolitan Life Ins. Co. (Ga. Ct. of App., 1957) 98 S.E.2d 391.

The application was not approved at the Company's Home Office at all. It received it only after Grant's death, and then it was only partially completed. The uncompleted application, at the time of death, was in the possession of the Company's medical examiner and, about a week later, was sent to the Home Office of Appellant without any premium. (R. 235.) There is no conflict in the evidence on these facts. The failure of Peter Grant to take the medical examination, as required, was non-performance by him of a true condition precedent to the obligation of Appellant. (3 Williston on Contracts, Rev. Ed. §666A.) Grant knew he had to submit to a medical examination "for this insurance" and he was the only one who could do it.

Many rights under a contract of insurance relate to the "in-force date of the insurance contract", such as the premium chargeable based on the attained age of the insured, the commencement of the incontestable period, determination of loan value, reserve basis, dividends, extended insurance, paid-up insurance,

cash surrender value, application of the suicide clause, etc. (*Lloyd v. Franklin Life Ins. Co.* (9 Cir., 1957) 245 F.2d 896.) The advantages of the conditional receipt to Peter Grant are easily illustrated.

The facts reveal that, on August 11, 1954, Peter Grant was over 35 years old (born February 19, 1919) and that, nine days after August 11, 1954, his attained age (age nearest birthday) would have increased by one year. (Part A of the application, Ex. 1.) It is a matter of common knowledge that life insurance premiums increase with age, and other rights and obligations change or modify accordingly. It should be pointed out that, if the full first premium had been paid and the completed application had been approved, Peter Grant's life would have been insured at age 35 and not at 36, even though it took more than nine days to process the application. On a whole life policy the saving in premiums could amount to hundreds of dollars. The conditional receipt protects the applicant for insurance against the contingency of sickness or death intervening its date and the delivery of the policy, if the application for insurance is accepted.

Hyder v. Metropolitan Life Ins. Co. (S.C., 1937) 190 S.E. 239.

De Cesare v. Metropolitan Life Ins. Co. (Mass., 1932) 180 N.E. 154, cited with approval and distinguished in *Hyder v. Metropolitan Life Ins. Co.*, supra. (Both cases involved conditional receipts nearly identical with Appellant's receipt given to Peter Grant.)

Parties to insurance contracts, as in other contracts, have the right to fix the time when and conditions upon which insurance shall be in force and such time may be prior to, at the time of, or subsequent to the delivery of the policy.

Potts v. Metropolitan Life Ins. Co. (Pa., 1938) 2 A.2d 870, cited with approval in *Lloyd v. Franklin Life Ins. Co.*, supra.

F. In a situation such as this no life insurance company has ever been held liable. Similar cases hold there is no insurance in force.

In *Hyder v. Metropolitan Life Ins. Co.*, supra, the facts are that a written application was made by the father of a nine-year-old boy. The receipt given the plaintiff was almost identical with the receipt given by Appellant in this action. The boy died before a medical examination and before the application had been sent to the Home Office. At the time of death the application was on the desk of the examining physician of the Company. Upon the conclusion of the plaintiff's case in the trial court, the defendant moved for a nonsuit, but the motion was denied. Although the plaintiff attempted to prove an oral contract of insurance, based on alleged statements of the insurance company's agent, the trial court sustained objections to this testimony and tried the case on the theory that the issue to be determined was whether the application and receipt constituted a written contract of insurance. In overruling the motion for nonsuit and in his charge to the jury, the trial judge made certain comments in regard to the purpose and

effect of a conditional receipt. The jury brought in a verdict for the plaintiff. The Appellate Court reversed and held that the conditions laid down in the receipt were conditions precedent and that the motion for nonsuit should have been granted. In connection with the remarks of the trial judge, the Appellate Court said at 245:

“We do not think that his honor has correctly construed this binding receipt. He plainly states that the receipt does not mean what it says. We think it does. He interpolates into it language and conditions which are not in it. This interpretation of the binding receipt is not in accord with the interpretations given such receipts in this jurisdiction, and the majority of other jurisdictions, including the federal courts.”

The Court distinguished cases such as *Cantor v. Life Ins. Co.* (S.C., 1933) 168 S.E. 848; *De Cesare v. Metropolitan Life Ins. Co.*, supra, on the ground that in those cases the application was completed, received by the company's home office, and approved.

The facts in *Mofrad v. New York Life Ins. Co.* (10 Cir., 1953) 206 F.2d 491, also disclose the applicant died prior to the completion of the application and taking a medical examination. As in the instant case, the agent advised the applicant that he would have to have a physical examination and, in fact, made several appointments with authorized physicians for the applicant. The applicant did not have the physical examination, apparently due to the press of personal matters. The Court said at 493:

“And there are no provisions in the agreement which would lead to a conclusion that an interim contract was intended by the parties. There are other clearly prescribed conditions within the agreement than the payment of the premium and delivery of the receipt to the applicant, which lead only to the conclusion that the applicant was merely applying for a contract of insurance which could be consummated only upon the fulfillment of the conditions set out in the application. And where a policy application contains such conditions precedent, performance thereof is a prerequisite to the taking effect of insurance coverage. (Citing authorities.)

* * *

“But appellants argue that unless the insurance began on the date of the application, as specified in Part 3, the premium would cover a period during which the company did not assume the risk, and the insured would be paying for insurance for a period when he was not insured.

“The application for the policy provided that the insurance policy should be dated as of the date of the application. ‘It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding.’ *Jones v. New York Life Ins. Co.* (1927), 69 Utah 172, 253 P. 200, 202. The provisions in the application agreement do not fix the effective date of the insurance contract. They simply impose conditions precedent to the taking effect of the insurance coverage. (Authority cited.)

* * *

“We must conclude that the applicant failed to meet the required conditions precedent to the consummation of an insurance contract, and the judgment of the trial court is affirmed.”

In *Corn v. United American Life Ins. Co.*, supra, the company's application consisted, so far as is pertinent, of two printed forms, one of which was entitled “Part One of Application for Insurance”; the other was headed “Part Two of Application for Insurance”. The applicant executed Part One of the application in the presence of the company's agent. Part Two was a medical or health questionnaire. At the time Part One was signed the applicant gave the agent a check to cover the first year's premium on the anticipated policy. At the same time, the applicant suggested to the agent that he desired to have the physical examination on or about January 20, 1948. The agent agreed to this arrangement. The applicant failed to have the physical examination on January 20, 1948, and, although the company wrote him several letters, he never had the physical examination and Part Two of the application for insurance was never submitted. On February 16, 1948, the applicant was killed in an airplane accident.

In its opinion the Court said at page 615:

“There is some confusion among the authorities as to the legal effect of the arrangement disclosed by the record herein. From a study of these decisions, the Court is satisfied that many of the seeming conflicts and the conclusions reached therein may be accounted for by the factual dif-

ferences in the terms of the individual contracts involved. The Court, therefore, believes that each contract for interim insurance should be measured on its own merits and in the light of its own particular wording. (Citing cases.) * * * An ordinary common sense interpretation of the critical clause in the receipt reveals that the word 'provided' was used in the sense of 'if'. Insurance was to take effect as of January 15, 1948, *if* Part Two was promptly completed and the remaining conditions were met. (Citing authorities.)

"In addition, it must be remembered that the completion of Part Two of the application required the taking of a medical examination and the submission to the Company of the data revealed by that examination together with a urine specimen and a medical history. In other words, the first condition in the proviso required acts on the part of Corn rather than acts or a state of mind on the part of the Company. The Restatement of Contracts, section 260, comment b, expresses unequivocally that:

'Any clause . . . in a policy of insurance requiring any act to be done by the insured, will make that act a condition of the covenant or promise of insurance.'

It must also be remembered that Part Two was actually an element of the application for insurance. Surely the parties did not intend coverage to be effected prior to the time it was fully applied for."

* * *

"Diligent search has failed to reveal a single authority which recognizes the existence of in-

terim insurance where the alleged insured himself had failed to take steps upon which the agreement of the parties conditioned liability.

“In addition, it should be pointed out that at the time Corn passed away, the Company had no knowledge of his physical condition. When Part One was completed, Wilder informed Corn that Part Two had to be executed and that this required a physical examination. Besides that, the Company mailed Corn three letters in a period of less than one month, urging him to take the examination, when it appeared that he was procrastinating about the matter. Under those circumstances, it is not readily conceivable that the Company intended to insure Corn, or that Corn understood the Company to intend to insure him, without any knowledge of his physical status.”

Appellant's application and receipt both provide, in effect, that, after the conditions precedent are performed, “then” the insurance in accordance with the terms of the policy applied for shall be in force from “this date” (the receipt) or the date of Part A. The effect of this is to fix the time to which the insurance relates after the conditions precedent have been performed. When Appellant's application and the receipt are construed together, it plainly appears that insurance may become effective by one of two methods. First, if “a policy has been delivered and the full first premium specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant”. Second, “if an amount equal to the full first premium on the policy applied for is paid to and accepted by the Com-

pany at the time *Part A of this application* is signed and *if this application* is approved at the Company's Home Office, the class, plan and amount of insurance herein applied for, then the insurance . . . etc." A holding that insurance was in force, even though the application was not completed, the physical examination was not had, and the completed application and full first premium payment were not received at the Company's Home Office, nullifies completely the plain meaning of the words used in the application and receipt and ignores the law on this subject.

In the *Corn* case, *supra*, Part 2 of the application is the medical part equivalent of the Metropolitan's Part B medical part. Over the signature of the applicant in Part 1 of the application in the *Corn* case is the printed statement "This application including part 2 hereof, which part 2 I agree to complete promptly as the Company may require . . ."

The Appellant's receipt in the instant case, when construed with the application, makes it equally clear that Grant was to take a medical examination "for this insurance". The receipt has the following printed and written matter:

"Appointment for Medical Examination

* 1st—small office

Date * not Thurs.
.....

* Dr. Blaisdell

Between the hours of.....and.....or
P.M."

Note: * In handwriting of Mr. Price.

The interpretation placed upon that by Grant himself is that he had to go to Dr. Blaisdell for a medical examination "for this insurance". (R. 105-107, 130.)

Therefore, the *Corn* case and the instant one are identical on interpretation.

G. Under a California statute a receipt does not become binding until a completed application is approved.

In 1949 the California Legislature enacted Insurance Code § 10115. The statute is set forth in full in Appendix B of this brief. The section states under what circumstances a conditional receipt may effect a binding contract of insurance. It states, in effect, when a payment is made equal to the full first premium at the time an application for life insurance is signed by the applicant and the applicant receives at that time a receipt for said payment on a form prepared by the insurer, and if the insurer *approves* the application for the plan and for the class of risk and amount of insurance applied for, and the applicant dies on or after the date of the application, the date of the medical examination, if any, or after the date specially requested in the application for the policy to take effect, *whichever is later*, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date such application was signed by the applicant.

This statute gives applicants for life insurance certain rights as a matter of law. (*Lloyd v. Franklin Life*

Ins. Co., supra.) Moreover, it is an expression of the Legislature as to what constitutes fair dealing between insurance companies and applicants for life insurance. The statute recognizes the right of the insurance company to *approve* of the application before death as to the plan and for the class of risk and amount of insurance applied for. This recognition of the validity of the "approval" requirement is applicable in this case.

This section recognizes as conditions precedent to liability of the insurance company payment of the full first premium, "approval" and a *medical examination*. The conditions were not performed in this case because Grant failed to perform conditions which only he could perform. The language in Part A of Appellant's application and of Appellant's receipt fully advised Grant of his rights under the law of California.

Plaintiff's Exhibit 2 (R 245) is not a "binding receipt". It is not labelled at all. It is a receipt with conditions. Insurance Code § 10115 states under what circumstances a receipt for payment of a life insurance premium shall be considered to be a binding receipt, i.e., binding as a contract of insurance. A comparison of § 10115 and Appellant's receipt reveals that Appellant's receipt was not "binding" and that no insurance could exist by virtue of the receipt until all of the conditions precedent were fully performed. Appellant's receipt states that *if* a condition is performed, and *if* another condition is performed, *then* insurance shall be in force, *but otherwise no insurance shall be in force* unless and until a policy is deliv-

ered and a full first premium is paid to and accepted by the Company during the lifetime and continued insurability of the applicant. Appellant's receipt, as does Ins. Code § 10115, first sets forth the conditions precedent and *then* refers to the insurance company's obligation to pay. Application of the provisions of said statute to the facts herein lead to only one conclusion, namely, that the Judgment of the District Court is against the law.

H. Ransom v. Penn Mutual Life Ins. Co. is not a precedent in this case.

The District Court, in its memorandum of opinion, said:

"I find very little difference in this case and the case of *Ransom vs. Penn Mutual Life Insurance Company*, (Calif.) 274 P.2d 633." (R. 37.)

We respectfully submit that, contrary to the opinion of the District Court, there are *many* differences between this case and *Ransom v. Penn Mutual Life Ins. Co.*, *supra*. These differences compel a reversal of the Judgment of the District Court.

In the *Ransom* case the California Supreme Court merely held that, under the particular language in the *Penn Mutual* application, a contract of insurance arose only upon the receipt at the home office of the insurance company of the *completed application* (including the medical) and the full first premium.

- (1) An entirely different application and receipt are involved in this case.

In the *Ransom* case the Court construed language contained in the application of *Penn Mutual*. (Apparently, only the form of the receipt for payment of the first premium was before the Court.) The *Penn Mutual* application contained the following clause:

“If the first premium is paid in full in exchange for the attached receipt signed by the Company’s agent when this application is signed the insurance shall be in force, subject to the terms and conditions of the policy applied for, from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the Proposed Insured was at that date acceptable under the Company’s rules for insurance upon the plan at the rate of premium and for the amount applied for, but that if such first premium is not so paid or if the Company is not satisfied as to such acceptability, no insurance shall be in force until both the first premium is paid in full and the policy is delivered while the health, habits, occupation and other facts relating to the Proposed Insured are the same as described in Part I and Part II of this application and in any amendments thereto.” (43 C.2d at 423.)

Note that, at the very beginning of the *Penn Mutual* clause, it states that:

“If the first premium is paid in full . . . when this application is signed the insurance *shall be in force*, . . .” (Our emphasis.)

and thereafter is wording concerning conditions, one of which the Court held to be a condition subsequent.

In contrast to the above, the *Metropolitan's* application (Paragraph 4 of Part A of Exh. 1) reads as follows:

“If an amount equal to the full first premium . . . is paid . . . at the time *Part A of this application* is signed and *if this application* is approved at the Company's Home Office . . . then the insurance . . . shall be in force . . .” (Our emphasis.)

There is nothing following this that is or can be construed as a condition subsequent.

The equivalent language is in the *Metropolitan's* receipt (Exh. 2, R. 245), but we do not have to emphasize it because the Appellant did so when the forms were printed. (See underlining.)

The Court, in *Hyder v. Metropolitan Life Ins. Co.*, supra, had before it a receipt almost exactly like Appellant's here. The Court held that there was no insurance in force until the application had been approved by the Company's Home Office. The Court also discussed *Stanton v. Equitable Life Assurance Society* (S.C., 1926) 135 S.E. 367, which was concerned with a receipt similar to the *Penn Mutual* clause. That receipt stated that insurance would take effect “provided the applicant is, on this date, in the opinion of the Society's authorized officer in New York, an insurable risk under its rules, and the application is otherwise acceptable on the plan and for the amount and at the rate of premium applied for.” The Court noted that the *Stanton* case receipt differed radically from the one before it and, after quoting the

language contained in the *Stanton* case receipt (190 S.E. at 248), said: "Note the glaring differences between this receipt and that in our present case."

Each application and receipt should be measured on its own merits and in the light of its own particular wording.

Corn v. United American Life Ins. Co., supra.

(2) Whenever Appellant's application or receipt have been construed by the Courts they have been held to be clear and unambiguous.

Another distinction between the *Ransom* case, supra, and this one is that in the *Ransom* case the Court found ambiguity in the *Penn Mutual* application.

Here the situation is different. The District Court from which this appeal is taken found no ambiguity in the Appellant's application or receipt. Where other jurisdictions have interpreted the *Metropolitan's* applications and receipts those Courts have held them to be clear and unambiguous.

Kammerer v. Metropolitan Life Ins. Co., supra;
Hyder v. Metropolitan Life Ins. Co., supra.

The Court, in *Hyder v. Metropolitan Life*, supra, had before it for consideration a receipt of Appellant's which, in all material respects, was the same as the receipt in the present action. The Court said, at 190 S.E. 245:

"We think there is no ambiguity about this receipt. It means just what it says, viz: If the application is forwarded to the home office and approved for the class, plan, and amount of insurance applied for, the insurance is of force from the date of the receipt; and it follows that,

if the applicant dies after that date and before the issuing and delivering of the policy, his insurance will be paid. If no binding receipt is given, then the contract of insurance is not effective until the policy is issued and delivered during the lifetime of the insured.”

Where the terms of a contract of insurance are plain and explicit, it must be interpreted according to its plain meaning and that Court will not indulge in a forced construction so as to cast a liability upon the insurance company which it has not assumed.

Lloyd v. Franklin Life Ins. Co., supra;

Home Indemnity Co. v. Standard Accident Ins. Co. (9th Cir. 1948) 167 F.2d 919;

New York Life Ins. Co. v. Hollender, supra;

Blackburn v. Home Life Ins. Co. (1941) 19 C.2d 226, 120 P.2d 31.

(3) The facts in this case are different from those in *Ransom v. Penn Mutual*.

Here Grant never took a medical examination and, consequently, Parts B and C of Appellant's application (Exh. 1) *could not be completed* or sent to the Home Office.

In the *Ransom* case the applicant did take a medical examination so that the application *was completed* and sent to the Home Office. It was only under those *facts* that the Court held a contract of insurance arose.

The District Court, in this case, erred in failing to find facts on a material issue which should have made a difference in the outcome of this case.

NOTE: Up to this point we have covered substantially Specification of Errors Nos. 1, 2, 4, 8, 9, 15, 16, 17, 18, 19, 20 and 21.

2. APPELLEE FAILED TO PROVE THAT APPELLANT, AT ITS HEAD OFFICE, AUTHORIZED AND APPROVED PETER GRANT FOR INSURANCE AS TO THE BUSINESS IN WHICH HE WAS ENGAGED.

There is no evidence to support the allegation in the second cause of action of Appellee's First Amended Complaint to the effect that Appellant, on August 11, 1954, accepted a premium payment "after having previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract". (R. 26.) The District Court found on this issue only that:

"On or before August 10, 1954, defendant, at its head office, authorized and approved Peter Grant for insurance as to the business in which he was engaged." (R. 39-40, Finding VII.)

This indicates that the District Court concluded that Appellee did not prove her allegations (R. 26, top of page) of prior approval by Appellant at its home office for the class, plan and amount of insurance applied for. Furthermore, Finding No. VII, concerning approval as to the "business", is erroneous because the evidence is to the contrary. Appellant's Exs. A, B, C, D, E and F and Appellee's 5 indicate Appellant at its Home Office had certain information prior to August 10 and 11, 1954, but those exhibits

conclusively prove that the home office did not approve anything before those dates. The sum and substance of the evidence is that knowledge of the nature of Grant's business, a crop-duster, was acquired by the Home Office and it said it would have to view the *completed papers* before taking action. (Ex. D, R. 253; 171, 172-187; 181-182; 193-194.)

The Home Office was first asked by its District Office if an application could be submitted on Grant for \$5,000.00 additional insurance. (Dft's Ex. A; R. 250.) Grant then had a \$5,000.00 policy issued in 1950 before he became a crop-duster. (R. 174.) After obtaining a completed aviation questionnaire, Appellant advised its District Office, by letter of July 20, 1954, that it could "consider" Peter Grant for insurance. (Ex. D; R. 253.) In that letter Appellant made it clear that it could not promise to issue a policy until it viewed the completed papers, suggesting that an application be completed and a medical examination be arranged between Peter Grant and an authorized medical examiner.

There is nothing in this case that can be construed as an approval by Appellant of Peter Grant for insurance with respect to his occupation. Appellant merely advised its District Office that it could "consider" issuance of a policy to Grant when it viewed the completed papers. The letter of July 20, 1954, was shown to Grant (R. 193-194) and, in addition, he was put on notice, when he signed Part A of the application, that no agent, medical examiner or any person except the President, Vice Presidents, Actuaries,

Treasurers or Secretaries of the Company had power on behalf of the Company (a) to make, modify or discharge any contract of insurance, or (b) to bind the Company by making any promises respecting any benefits under any policy. (Ex. 1, Part A.)

The evidence is that an application (and not just a "trial" application) must be submitted to the Home Office. (Ex. D.) Appellant made this clear in its letter of July 20, 1954 (Ex. D), when it required that the application be completed, a medical examination be taken, a mercantile report ordered in the usual manner, and that the "completed papers" be viewed at the Home Office. In any event, it is unbelievable that Grant, a businessman who was already the owner of a life insurance policy issued by Appellant, could have thought that all that was necessary for him to obtain additional life insurance was to have the Appellant authorize and approve him as to his occupation. The evidence establishes that Grant knew otherwise.

The foregoing also applies to Specification of Error No. 14, namely, the failure of the District Court to make a Finding on a material issue as set forth in paragraph 14, page 238 of Record.

3. APPELLEE FAILED TO PROVE THAT APPELLANT FULLY INFORMED ITSELF OF PETER GRANT'S NEEDS AND DESIRES FOR LIFE INSURANCE. APPELLEE FAILED TO PROVE THAT APPELLANT FULLY INFORMED ITSELF OF OTHER FACTORS BEARING UPON GRANT'S ACCEPTABILITY AS AN INSURANCE RISK AND THE TERMS UPON WHICH SUCH RISK WOULD BE ASSUMED BY APPELLANT.

A. Peter Grant inquired about various plans of insurance of the face amount of \$5,000.00.

The evidence clearly establishes that, prior to the death of Grant, Appellant had *knowledge* that Grant was considering only \$5,000.00 of Whole Life insurance.

Appellant first received a trial application on a \$5,000.00 Whole Life Paid-Up at Age 85 policy. Appellant was next advised that Grant was interested in Family Income with Whole Life Paid-Up at Age 85 and was still interested in \$5,000.00 on this plan. At the time of Grant's death, the incomplete application (Ex. 1) was in the hands of Appellant's medical examiner in Watsonville. It was not until after Grant's death that the uncompleted application was sent to Appellant's Head Office and that Appellant had any knowledge that Grant was considering more than \$5,000.00 face amount of Whole Life insurance. These facts are undisputed.

B. Authority of Appellant's agent was limited.

In Part A of the application (Ex. 1), directly over the signature of Peter Grant, is a statement to the effect that no agent, medical examiner or any other person (except certain officers of the Company) has power on behalf of the Company to make, modify or

discharge any contract of insurance or to bind the Company by making any promises respecting any benefits under any policy issued thereunder.

Said Part A, directly over the signature of Grant, also contains a statement to the effect that no statement made to or by, and no knowledge on the part of any agent, medical examiner or any other person as to any facts pertaining to applicant shall be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or Part B of the application for insurance.

Such limitations of the authority of an agent are proper and, when Grant signed Part A of the application, notice was thereupon given him of the limitation of the authority of the agent, medical examiner and any other person and Grant was bound by such notice.

Winslow v. Mutual Life Ins. Co. (9 Cir., 1938),
93 F.2d 802;

New York Life Ins. Co. v. Fletcher, 117 U.S.
519, 529, 29 L.Ed. 934;

Iverson v. Metropolitan Life Ins. Co., 151 C.
746, 91 P. 609;

Toth v. Metropolitan Life Ins. Co., 123 C.A.
185, 11 P.2d 94;

Lucas v. Metropolitan Life Ins. Co., 14 C.A.2d
676, 58 P.2d 934;

Hutchinson v. Metropolitan Life Ins. Co.,
supra.

C. Appellant had no knowledge of the medical condition of Peter Grant.

Appellant had no knowledge of the medical history or health of Grant, either before or after his death. Grant did not have a medical examination by Appellant's medical examiner, Part B of the application, "Applicant's Statements to the Medical Examiner", was not completed, nor was the medical examiner's report (Part C of the application) completed.

So prevalent is the practice among life insurance companies to require a complete physical examination and medical history before issuing a policy of the amount here involved that it seems unnecessary to argue that these are important factors bearing upon Grant's acceptability as an insurance risk. Appellant had no knowledge of these factors.

D. Finding of Fact No. V is erroneous. That portion of the finding attacked is too broad.

Appellant did not have full knowledge of Grant's needs and desires for life insurance and was not fully informed of "other important factors bearing upon his acceptability as an insurance risk", and was not fully informed of the "terms upon which such risk would be assumed". Grant was advised that no statement or knowledge on the part of any agent or medical examiner as to any facts pertaining to Grant were made to or brought to the knowledge of the company unless stated in either Part A or Part B of the application for insurance. Parts B and C were not completed. The Appellant had not "viewed" the "completed papers". (Ex. D; R. 253.)

Finding of Fact No. V is prejudicially erroneous and is not supported by the evidence.

4. FINDING OF FACT NO. IX, TO THE EFFECT THAT APPELLEE AND PETER GRANT CONSTRUED THE APPLICATION AND RECEIPT AS EFFECTING A CONTRACT OF INSURANCE AND THAT SUCH CONSTRUCTION WAS REASONABLE IS CLEARLY ERRONEOUS AND CONTRARY TO THE EVIDENCE, AND STATES CONCLUSIONS AND NOT FACTS.

Peter Grant construed the application as requiring a medical examination as a condition precedent. Appellee's own evidence, hereinabove discussed and quoted, conclusively establishes that Price told Grant that he had to have a medical examination "for this insurance". (R. 130.) Concurrently, Price filled in the information concerning the medical appointment in the receipt, while discussing the medical requirement with Grant. (Ex. 2; R. 218; R. 71-75.) On August 12, 1954, Appellee, as agent for Peter Grant, made an appointment for him to submit to a physical examination by Dr. Blaisdell at 3:30 p.m., August 13, 1954. (R. 107, 130.) This evidence of the conduct of Grant by his agent, before any controversy arose, is entitled to great weight in determining the intentions of the parties and construing the application and receipt.

Corn v. United American Life Ins. Co., supra;
Flax v. Prudential Ins. Co. of America, supra;
Nicolaysen v. Pacific Home, supra.

Appellee, on cross-examination, retracted her statement to the effect that she and Peter Grant "as-

sumed" that the insurance was in force when the premium was paid. She then testified as to her personal assumption, saying "I assumed". (R. 129.) That was merely a conclusion of one not a party to a contract.

The retraction leaves no evidence of Grant's assumption and the inference is that he did not so assume. Furthermore, his action in arranging to see Dr. Blaisdell indicates a contrary intent. "Actions speak louder than words", and actions certainly speak much louder than any unexpressed assumption.

In *Zurich Assurance Co. v. Industrial Acc. Com.*, 132 C.A. 101, 103, 22 P.2d 572, 573, the Court said:

"... the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention."

The last sentence of Finding of Fact IX says "Said construction was reasonable." This portion of the finding is a misplaced conclusion of law.

**5. THE DISTRICT COURT PREJUDICIALLY ERRED IN OVER-
RULING APPELLANT'S MOTION TO STRIKE THE OPINION
OF DR. SAMBUCK.**

Appellee's witness, Dr. Antone J. Sambuck, testified that he examined Peter Grant on June 8, 1954, as a medical examiner for the Civil Aeronautics Administration. Over Appellant's objection (R. 119), the District Court allowed Dr. Sambuck to testify that,

on June 8, 1954, he found Grant in good physical health. Again over Appellant's objection and motion to strike, Dr. Sambuck was allowed to testify that, based on his examination of Peter Grant on June 8, 1954, and all his experience as a life insurance medical examiner, his opinion was that, if he had examined Grant for an insurance company, he would have okayed him. (R. 120-122.)

There was no issue in this case concerning Grant's physical condition on June 8, 1954. The date of the application (Part A) was August 11, 1954. Proper objection was made. The testimony of Dr. Sambuck that, after reading Parts B and C of Exhibit 1, he did not note any derogatory information as of June 8, 1954, was irrelevant and the objection on that ground should have been sustained. (R. 122-124.) Grant's health on June 8, 1954, is too remote in time to show his health on August 10, 1954. Another reason the evidence was immaterial is that Part A of the application and the receipt did not condition the effectiveness of the desired insurance entirely on the good health of Peter Grant; rather, it conditioned such effectiveness on the approval of the completed application at the home office and payment of the full first premium.

None of Dr. Sambuck's testimony has any probative value, anyhow. He admitted he knew nothing about Appellant's insurance requirements and stated that he did not know whether Appellant would have approved Peter Grant for insurance. (R. 126-127.) Dr. Sambuck didn't see Grant after June 8, 1954. (R. 114-115.)

The foregoing relates to Specification of Error No. 22.

6. SPECIFICATION OF ERROR NO. 6.

The Finding No. VI (R. 39), to the effect that up to and including August 13, 1954, Grant enjoyed excellent health and suffered no disability, infirmity or ailment is erroneous and contrary to the evidence for the following reasons:

1. There is not a scrap of evidence in the record that Grant was in "excellent health" at any time.

2. Dr. Sambuck's testimony, as pointed out above, carries no weight and portions should have been stricken. His examination also was remote in time.

3. Appellee's Ex. 6, Dr. Sambuck's Medical Certificate (not a certificate of insurance as he testified—R. 119, last three lines) for the C.A.A., shows a "physical deficiency". (R. 249.)

4. Appellee's testimony is that Grant had stomach trouble in July 1954. (R. 114.)

5. The only other evidence is the Appellee's, as a lay witness, that her husband was in good health on August 10, 11, 12 and 13, 1954.

7. SPECIFICATIONS OF ERRORS NOS. 3, 10 AND 12. CERTAIN FINDINGS OF FACT CONTAIN MISPLACED CONCLUSIONS OF LAW AND UNNECESSARY FACTS.

Finding of Fact No. II (R. 38), wherein it states "Plaintiff is . . . the beneficiary *named in the contract*

of insurance sued upon” is erroneous in that it states as a fact what is properly a conclusion, the existence of a contract of insurance between Grant and Appellant.

The same error appears in Finding of Fact No. X (R. 40-41), wherein it refers to “said contract of insurance” and in Finding of Fact No. XII (R. 41), wherein it states “Said contract of insurance provided . . .”

The question raised by the pleadings is whether there was a contract of insurance. In *Hunter v. Sparling* (1948) 87 C.A.2d 711, 721, 197 P.2d 807, 813, the Court said:

“From these basic facts the question is presented, is plaintiff entitled to recover the sum of \$20,-835.50, plus interest, from defendant? That is a question of law and not of fact. The question as to whether, from the facts found, there was a contract, . . . or any other legally enforceable obligation, is a question of law and not of fact. For that reason the ‘finding’ that the rules and regulations relating to retirement formed no part of plaintiff’s contract of employment is not a finding of fact at all but a misplaced conclusion of law, not supported by the facts found, which facts are practically undisputed. The rule applicable to such a situation is well settled. Where a conclusion of law is not supported by the facts found, the conclusion of law must be disregarded.” (Cases cited.)

In the instant case all portions of the Findings of Fact to the effect that there was a “contract of insurance” should be disregarded.

All of Finding of Fact No. X should be disregarded. It states (R. 40) :

“At no time prior to the death of Peter Grant did the defendant perform any act or communicate an intention to rescind or terminate said contract of insurance.”

This “finding” anticipates the District Court’s conclusion. Rescission of a contract of insurance was not an issue before the Court. No such defense was raised by Appellant’s Answer to the First Amended Complaint. Finding of Fact No. X is unnecessary, improper and prejudicial to Appellant. As we have already demonstrated, there was no contract of insurance in force on August 13, 1954. It follows that there could be no act or communication by Appellant of an “intention to rescind or terminate said contract of insurance.”

8. SPECIFICATION OF ERROR NO. 11.

The Court erred in finding as a fact that portion of Finding No. XI (R. 41) that Grant died

“... solely as the result of an accident while engaged in his occupation hereinbefore mentioned.”

Said finding is erroneous and not supported by the evidence and is not an issue in this case. The issue as to how Grant died was raised in the first cause of action in the First Amended Complaint, but this was dismissed. (R. 34.) It is admitted by the Appellant in its Answer that Grant died August 13, 1954. (R. 33.) Appellee testified he died in the morning of that

day. (R. 107.) Counsel for Appellant was careful not to stipulate as to the manner of death. (R. 108-112.) There should be no finding such as the one mentioned above in this case, which might be construed as res judicata in another suit on a policy such as the one mentioned in the first cause of action of the First Amended Complaint, especially where said first cause of action has been dismissed herein.

9. SPECIFICATION OF ERROR NO 13.

The Court erred in failing to make a finding on a material issue, namely, that on August 14, 1954, Grant's check for \$53.36 was returned to Margaret L. Grant by the Appellant and she accepted it, and no tender has ever been made of any amount of money since then to the Appellant on account of the application for insurance. (See paragraph 13, R. 238.)

It is undisputed that the check was returned and she accepted it. It was also stipulated that, after the check was returned and accepted on August 14, 1954, no tender has ever been made of any amount of money since then to the Appellant on account of the premium on the application. (R. 134-135.)

10. EVIDENCE CONCERNING APPROVAL WAS ARBITRARILY EXCLUDED.

We come now to the discussion of Errors Nos. 23 and 24.

Specification of Error No. 23 has to do with the District Court's refusing to allow Mr. Svendsen, Chief Underwriter of Appellant, to testify that the application, if completed, would have come to his division.

It must be remembered that one of the conditions precedent to insurance in this case is approval of the completed application at the Home Office of the Company as to the class, plan and amount of insurance applied for. Nevertheless, the District Court refused to allow Mr. Svendsen to testify that the application, if completed, would have come to his division. He is the Chief Underwriter. The soliciting agent is not an underwriter. The question put to Mr. Svendsen was a preliminary one, but the Court refused to allow an answer. (For the proceedings see R. 221-222.)

Specification of Error No. 24 is that the Court erred in refusing to allow Mr. Svendsen to testify that the weight of an applicant had anything to do with the classification of the applicant.

In the plaintiff's case below, the Court had allowed Dr. Sambuck to testify as to the weight and height of Grant on June 8, 1954. (R. 124-125.) Based upon those facts, and others recited by Dr. Sambuck, said doctor was allowed to give his opinion as to the insurability of Grant. (R. 121.) It is a matter of common knowledge that there is a relationship between height and weight. Tables and charts on this have been sup-

plied to the public in numerous magazine articles and other publications. Nevertheless, the District Court refused to allow Mr. Svendsen to reply to a preliminary question: "Does the weight of an applicant, Mr. Svendsen, have anything to do with the classification?" (R. 228.) Again, it must be borne in mind that, under Appellant's application and receipt, approval at the Home Office of the class of insurance is a condition precedent to any insurance being effective. Examination at the Home Office of the completed application might have disclosed that Grant had to be classified above "Intermediate", and the application might have been rated up or rejected for that reason alone. This line of inquiry, however, was foreclosed by the District Court's ruling.

11. THE PREMIUM.

Neither the application nor the receipt specifies that the \$53.36 was the full first premium. (Ex. 1, No. 23(a) and Ex. 2.) In fact, Part A of the application says that the \$53.36 "has been paid in advance *on account of the first premium*". The receipt says the \$53.36 is "received" on "account of application . . ."

Apparently, Price made "approximate computations" (R. 215) of the premium and, therefore, the full first premium was not paid. However, Appellant was not allowed to prove the correct premium. (R. 222-226.)

It is undisputed that Appellant has no premiums.

CONCLUSION.

The record undisputably shows that Appellant, at its Home Office in San Francisco, had not, prior to August 10 or 11, 1954, approved any contract of insurance, the subject matter of this action, for the class, or the plan, or the amount of insurance applied for in Exhibit 1; nor had it approved any such insurance as to the business of the applicant, Peter Grant. (See Appellant's Exhibits A through G, all of which were properly admissible in evidence regardless of whether they were or were not shown to Mr. Grant.)

Likewise, the record, beyond dispute, shows that Peter Grant knew, on the evening of August 10, 1954, that he had to go and have a medical examination by Appellant's examining physician, Dr. Blaisdell. Obviously, the purpose of that examination was to complete the application and supply Appellant with essential information necessary for it to consider the risk. The risk in this case, at best, was a hazardous one. The applicant was a crop-duster. Mr. Grant's knowledge of the necessity of a medical examination and the intention of both parties to the documents that a medical was necessary "for this insurance" arose out of the plain terms and conditions of the application and the receipt, and the handwriting in the receipt, and the discussion had that evening with Mr. Price. The Appellee herself testified to that discussion as an explanation of said handwriting concerning Dr. Blaisdell.

Mr. Grant was not inexperienced in matters of this kind. In 1950 he had gone through the process of ob-

taining a \$5,000.00 policy of life insurance from Appellant and he also had a National Service life insurance policy for \$10,000.00 on the term plan since 1943. (See Ex. 1, Part A, No. 20.) He was a man of substance, earning \$15,000.00 per year (see back of Ex. 1). He was a businessman. He and Mrs. Grant operated the business in Watsonville for Atwood Crop Dusters of Salinas, California. (R. 138, 141.) He knew the difference between a "policy in force" and an application. (R. 106.)

Mr. Grant hastened to deposit money in the bank on August 11, 1954. That demonstrates that he knew he had to cover the check. That was a condition he had to perform. Likewise, he arranged with his wife, as his agent, to make an appointment with Dr. Blaisdell. That also demonstrates that he knew the medical examination was another condition on his part to be performed. He never performed that condition and, therefore, his omission prevented completion of the application before his death and the approval of the application at Appellant's Home Office. Mr. Grant, therefore, failed to fulfill one of the conditions upon which the agreement of the parties conditioned liability. Obviously, the medical examination had to be taken before Mr. Grant died. It could not be otherwise.

The precise factual situation presented by this case has never been ruled upon by any reported decision of the Supreme or Appellate Courts in California, to our knowledge, but, as pointed out above, other jurisdictions have encountered no difficulty in holding that

the Appellant's application and receipt are clear and unambiguous and, under situations such as this, have held that there is no insurance in force at the time of the applicant's death.

It is respectfully submitted that the Judgment of the District Court should be reversed and Judgment entered in favor of the Appellant.

Dated, San Francisco, California,
February 10, 1959.

Respectfully submitted,
KNIGHT, BOLAND & RIORDAN,
BURTON L. WALSH,
JOHN J. QUIGLEY,
Attorneys for Appellant.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

EXHIBITS

Plaintiff's Exhibits	Identified	Offered and Received	Offered and Rejected
1	58-60	63	
2	61-62	63	
3	63-64	64	
4	64-65	65-66	
5	95-96	96	
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Appendix B

CALIFORNIA INSURANCE CODE §10115

§10115. *Binders; death of insured before issuance of policy.* When a payment is made equal to the full first premium at the time an application for life insurance other than group life insurance is signed by the applicant and either (1) the applicant received at that time a receipt for said payment on a form prepared by the insurer, or (2) in the absence of such a receipt the insurer receives the said payment at its home office, branch office, or the office of one of its general agencies, and in either case the insurer, pursuant to its regular underwriting practices and standards, approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for, and the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date specially requested in the application for the policy to take effect, whichever is later, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant. The provisions of this section shall not prohibit an insurer from limiting the maximum amount for which it may be liable prior to actual issuance and delivery of the policy of life

insurance either to (1) an amount not less than its established maximum retention, or to (2) fifty thousand dollars (\$50,000.00), if a statement to this effect is included in the application.

No. 16,130

In the

United States Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

MARGARET L. GRANT,

Appellee.

Brief of Appellee

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FILED

MAR 17 1959

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In the
United States Court of Appeals
For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

MARGARET L. GRANT,

Appellee.

Brief of Appellee

STATEMENT CONCERNING JURISDICTION

Appellant's statement concerning jurisdiction (Appellant's Opening Brief pp. 1-2) is correct and appellee adopts it.

STATEMENT OF THE CASE

This case is governed, as appellant concedes, by California law.

The action was tried on the issues raised by the Second and Third Causes of Action of Appellee's First Amended Complaint and Appellant's Answer thereto (R 25-28; 32-34).

The action is based on a written contract of insurance made between appellant and appellee's former husband, Peter Grant, on August 11, 1954 in Watsonville, California, consisting of a written application and a receipt (Exs 1 & 2; R 244-244D and 245).

Appellee alleges in her Second Cause of Action that appellant had "previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract (R 26). Appellee's Third Cause of Action is identical to the Second except that it omits the above quoted clause. It is based on the theory that home office approval was a condition subsequent so that insurance went into effect prior to such approval.

The trial court found in accordance with the Third Cause of Action and entered judgment for appellee as therein set forth (R 43-45).

As appellant's Statement of the Case omits certain testimony favorable to appellee and sets forth certain testimony favorable to appellant which was controverted or otherwise impeached, appellee will set forth the evidence in chronological order, resolving conflicts in favor of appellee as the trial court did and was entitled to do:

George Price is the agent for the Metropolitan Life Insurance Company in Watsonville, California and vicinity. He has been the agent for that company in that area for about 23 years. During that time, he has engaged in no other occupation and he has been employed by no other company (R 56-57).

Prior to his death on August 13, 1954 (R 107), Peter Grant resided with his wife, Margaret L. Grant (now Margaret L. Kenny) and their two children at 111 Sudden Street, Watsonville, California. He was thirty-five years of age. Peter Grant was employed by Atwood Crop Dusters of Salinas, California, as a crop duster pilot. As such he sprayed and dusted crops and orchards by airplane (R 89-90; Ex 1, R 244). His occupation required him to fly his airplane close to the ground (R 138). Mr. Grant had a \$5,000.00 life insurance policy issued to him by Metropolitan

Life Insurance Company on May 1, 1950, before he engaged in crop dusting (R 174; Ex 1, R 244).

On June 8, 1954, Dr. Antone James Sambuck gave Mr. Grant the physical examination required by the Civil Aeronautics Administration. He took Mr. Grant's medical history. Dr. Sambuck found Mr. Grant to be in good physical health. He found no deficiencies in his physical condition. Dr. Sambuck issued a medical certificate to Mr. Grant. Dr. Sambuck was a medical examiner for life insurance companies other than appellant. In his opinion Mr. Grant was a medically standard insurance risk on June 8, 1954. Dr. Sambuck studied Parts B and C of appellant's application for life insurance (Ex 1, R 244). As of June 8, 1954, he would not have noted any derogatory information in respect to Mr. Grant on Parts B and C. Dr. Sambuck knew nothing of appellant's life insurance requirements (R 121-124, 126). Between June 8, 1954, and the date of his death Mr. Grant was ill for one day with a stomach ache and flu. He did not visit a physician between June 8, 1954 and the date of his death. Mr. Grant was in good health on August 10, 11, 12 and 13, 1954 (R 114, 115).

Around the first of June, 1954, Mr. Price called at the Grant home. He introduced himself to Mrs. Grant as the agent for Metropolitan Life Insurance Company; he knew that the Grants had a policy with Metropolitan; he wanted the Grants to know who he was and where they could get hold of him in case they wanted any information. A few days later Mr. Price again called at the Grant home. He asked Mrs. Grant if Mr. Grant was interested in more insurance. Mrs. Grant told him that Mr. Grant, who was not at home, had talked about taking out more insurance and that he should talk to Mr. Grant about it (R 90-91).

Mr. Price saw Mr. and Mrs. Grant toward the end of June, 1954. Mr. Price and Mr. Grant talked about life insur-

ance. Mr. Grant wanted a \$10,000.00 policy (R 94, 211). Mr. Grant wanted term insurance. Mr. Price told him he could not buy term insurance because of his occupation. Mr. Price suggested that Mr. Grant buy whole life insurance (R 211-212). At a later date but prior to July 26, 1954, Mr. Price suggested to Mr. Grant that he should buy a family income policy (R 213).

On or about June 28, 1954, Mr. Price met Mr. Grant and took a trial application for a \$5,000.00 policy of Whole-Life Paid-up at Age 85 (Ex A, R 250). Mrs. Grant was not present (R 95). The trial application was the same kind of form as Exhibit 1. Mr. Price wrote the word "Trial" on the form.¹ Mr. Price made no marks in the boxes opposite the words "Classification Applied For" in Section 18 of Part A of the form. Mr. Price did not ask for a premium (R 208).

The trial application was sent through appellant's Monterey office to its head office in San Francisco with a letter asking if an application for the described policy could be submitted and "what the extra aviation premium will be" (Exs A and B; R 250, 251). Appellant's Chief Underwriter by letter dated July 6, 1954, requested completion of Form 036 Aer. 6 "giving us full and complete details in regard to the applicant's past, present and future aviation activities" (Ex B; R 251).

Mr. Price saw Mr. and Mrs. Grant on July 14, 1954. Mr. Grant gave Mr. Price more information about his flying and signed an "Aviation Questionnaire" Form 036 Aer. 6 (R 95-96; Ex 5, R 248). Mr. Price suggested a family protection plan of insurance and stated that the premium exclusive of the aviation risk would be approximately \$400 for \$10,000 insurance (R 96, 97, 199). The Aviation Questionnaire was sent through appellant's Monterey office to its head office in

1. The trial application is not in the record. It was lost or destroyed by appellant (R 207).

San Francisco (Ex C; R 252). Appellant's Chief Underwriter by letter dated July 20, 1954, quoted the basic extra annual aviation premium per \$1,000.00 of insurance (Ex D; R 253). This letter was not shown to the Grants.²

On July 26, 1954, appellant's Monterey office requested the head office in San Francisco to give the amount of the extra aviation premium on the term element of the Family Income With Whole Life Paid-up At Age 85 plan (Ex E; R 254). Appellant's Chief Underwriter by letter dated July 30, 1954, referred to appellant's rate book and quoted the basic extra annual aviation premium on the amount of monthly income per \$1,000.00 of insurance (Ex. F; R 255).

Mr. Price next saw the Grants on August 5 or 6, 1954 at their home. Mrs. Grant was present during part of the conversation. Mr. Price showed Mr. Grant a paper. Mr. Price informed Mr. Grant that the company would insure him. Mr. Price informed Mr. Grant what the extra aviation premium would be (R 98-99). Mr. Grant wanted more time to consider whether he could afford this insurance (R 99).

During the evening of August 10, 1954, Mr. Price saw Mr. and Mrs. Grant at their home. Mr. Price showed Mr. Grant a letter and said the company would insure him in his business. Mr. Price had a form of application for insurance. He addressed to Mr. Grant the questions in Part A of the application. Mr. Grant answered the questions. Mr. Price wrote those answers on the face of Part A; wrote the date August 11, 1954 and the place. Mr. Grant signed Part A;

2. Although Price testified on direct that he showed this letter to Grant (R 193) he admitted on cross-examination that he returned it to the Monterey office prior to July 31, 1954 (R 214). The evidence is undisputed that he did not see the Grants between July 14, 1954 and August 5, 1954.

The failure to show this letter to Mr. Grant or appellee is significant because it is the only communication from appellant which could have put them on notice that appellant did not intend insurance coverage to be effective as soon as the premium was paid.

Mr. Price witnessed his signature. Mr. Price filled in and signed that part of the application entitled "To Be Completed by Agent". Mr. Price wrote in the answers, Mr. Grant signed and Mr. Price witnessed the armed forces questionnaire. Mr. Price filled in the Life Inquiry later (R 58-65, 101; Exs 1, 3 and 4; R 244, 246, 247).

The premium was payable monthly (Ex 1, R 244). Mr. Price had his rate books with him. He consulted them. He had in mind the instructions contained in the letter of July 30, 1954 from appellant's head office in respect to the extra premium for the family income benefit on an aviator; likewise the letter of July 20, 1954 from appellant's head office quoting the basic extra annual aviation premium per \$1,000.00 of whole life insurance. Mr. Price made computations. He asked Mr. Grant for a check in the sum of \$53.36. Mr. Price told the Grants that \$53.36 would be the monthly payment (R 101-102, 214-215). As the sum requested by Mr. Price was a bit in excess of his prior estimate, he double checked his calculations (R 102). The instructions to Mr. Price on the application stated "The full first premium must be obtained in advance if payable monthly" (Ex 1, p. 4, R 244D). This form of application is issued whether the premium is payable monthly, quarterly, semi-annually or annually (Ex 1, Item 18; R 244). Mrs. Grant wrote out and Mr. Grant signed a check in the sum of \$53.36 drawn on Bank of America National Trust and Savings Association, Watsonville, California, payable to appellant. Mrs. Grant informed her husband and Mr. Price that there was not enough on the check stub balance to make the payment and asked Mr. Price to hold the check one day until they could go to Salinas, withdraw the money from the Atwood Company and put it in the bank. Mr. Price said he would be glad to. On August 10, 1954, the Grants' bank balance was \$49.51; on August

11, 1954, \$490.00 was deposited in the account and there was sufficient money in the account to pay the check until the account was closed August 20, 1954 (R 103-105). Mr. Grant gave the check to Mr. Price. Mr. Price wrote and gave a receipt to Mr. Grant (R 60-62, 105; Ex 2, R 245). Mr. Price told Mr. Grant that he would have to go to Dr. Blaisdell and have his physical examination; that he couldn't go on Thursday because that was Dr. Blaisdell's day off (R 105-106; 130). Mr. Price did not state when the insurance would be effective (R 106, 129). Mr. and Mrs. Grant assumed that it was in effect when the premium was paid (R 129).³ Mr. Price took the application with him (R 66).

On August 11, 1954, on the back of the receipt, Mrs. Grant added \$53.66 to the monthly premium on the other Metropolitan policy then in force, and thus computed the total monthly outlay which the Grants would have to make for insurance (R 215-216, 218-219).

Mr. Price took the application to Dr. Blaisdell, appellant's medical examiner. He picked it up after Mr. Grant's death and sometime before August 20, 1954, sent it to appellant's Monterey office (R 235).

3. The pertinent testimony of appellee under cross-examination is as follows:

"Q. As a matter of fact, Mr. Price never made any representation at any time that you know of as to when insurance would take effect pursuant to this application, is that correct?

A. No, we assumed.

Q. What is that?

A. I assumed that it was in effect when we paid the premium." (R 129)

Appellant claims that appellee's latter answer was a retraction of the former one (Appellant's Opening Brief pp 56-57). It is no such thing; the trial court was entitled to infer that she was talking about herself and her husband in the first answer and that her train of thought was directed into a different channel by counsel's interjection.

On August 12, 1954, Mrs. Grant made an appointment for Mr. Grant to see Dr. Blaisdell on August 13, 1954, at 3:30 in the afternoon (R 107). Prior to 8:30 in the morning of August 13, 1954, Mr. Grant died as the result of an accident which occurred while he was dusting a strawberry field (R 107, 138-139).

During the morning of August 14, 1954, Mr. Price called at the Grant home with another man. The house was full of people. Mrs. Grant was under sedatives. Mr. Price handed Mrs. Grant a check and said "I never put it in the bank. I never deposited it. So the insurance is not in force." Mr. Price asked Mrs. Grant for the receipt (Ex 2, R 245). Mrs. Grant did not know where it was. Mr. Price asked Mrs. Grant to sign some papers. Mrs. Grant said "I don't want to sign anything". Mr. Price said "Well, if you will sign these we will advance you money". Mrs. Grant said "but I don't want to sign anything". Mr. Price left (R 112-113). The paper which Mr. Price wanted Mrs. Grant to sign was a standard release form which appellant required when an agent returned a check or money; it had nothing written on it; if Mrs. Grant had signed it, Mr. Price would have filled it out in front of her. Mr. Price did not produce the form (R 200-201, 207). Mrs. Grant did not return the check to appellant. After Mr. Price's visit on August 14, 1954, no tender was made to appellant of any amount of money on account of the application (R 135). On October 26, 1954, appellant received a written claim for insurance under Exhibit 1 and due proof of death (R 108, 111).

The application provided for a whole life family income policy in the sum of \$10,000.00. The beneficiary would receive \$10.00 a month for each \$1,000.00 of insurance for a period of 20 years from the date of the application; at the end of the 20-year period a lump sum of \$10,000.00 would be

paid to the beneficiary (R 66-68, 106; Ex 1, R 244). Margaret L. Grant was named as beneficiary (Ex 1, R 244).

The application contained the following printed matter above the signature of Peter Grant:

"The foregoing statements and answers are true and complete. It is agreed that: 1. The statements and answers in Part A and Part B of the application for this insurance shall form the basis of the contract of insurance, if one be issued. 2. No agent, medical examiner or any other person, except the President, Vice-Presidents, Actuaries, Treasurers, or Secretaries of the Company, has power on behalf of the Company: (a) to make, modify or discharge any contract of insurance or (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder. 3. No statement made to or by, and no knowledge on the part of any agent, medical examiner or any other person as to any facts pertaining to the applicant shall be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or Part B of the application for this insurance. 4. The Company shall incur no liability under this application until a policy has been delivered and the full first premium specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant, in which case such policy shall be deemed to have taken effect as of the date of issue as recited therein, except as follows: If an amount equal to the full first premium on the policy applied for is paid to and accepted by the Company at the time Part A of this application is signed and if this application is approved at the Company's Home Office for the class, plan and amount of insurance herein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from the date hereof.

Signed by applicant and dated at Watsonville this 11th day of August 1954."

The receipt signed by Mr. Price and delivered to Mr. Grant read as follows:

"Received from Peter Grant * * * Fifty-Three and 36/100 Dollars, on account of application made this date to the Metropolitan Life Insurance Company. *If the sum collected at the time Part A of this application is signed is at least equal to the full first premium on the policy applied for and if such application is approved at the Company's Home Office for the class, plan, and amount of insurance therein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from this date, but otherwise no insurance shall be in force under said application unless and until a policy has been delivered, and the full first premium specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant.* The above sum shall be refunded if the application is declined or if a policy is issued other than as applied for and is not accepted. If the Company offers, upon payment of the balance of the full first premium, to deliver the policy as applied for, and the offer is refused, the Company will retain from the above sum the costs incurred for medical examination, and will return the balance, if any, upon surrender of this receipt. This receipt is subject to the condition that any check or draft received may be handled for collection in accordance with the practice of the collecting bank or banks, and this receipt shall be void if the full amount of such check or draft is not received by the Company.

Appointment for Medical Examination Aug. 11, 1954
1st small office

Date not Thurs.

George I. Price

Dr. Blaisdell—District Monterey"

And on the margin the following:

"If policy is not delivered to you within 60 days from date, this receipt should be presented at the District Office, or the Home Office in New York, for refund."

STATEMENT OF QUESTIONS INVOLVED

1. The basic question is whether on August 13, 1954, the date of Peter Grant's death, a contract of insurance upon his life was in effect.

2. The subsidiary questions are:

a. Under the second cause of action: whether appellant at its home office had approved said contract of insurance on or prior to August 11, 1954 and

b. Under the third cause of action: whether home office approval was a condition precedent to any insurance coverage or, as appellee contends and the trial court found, approval was a condition subsequent; i.e. the applicant was insured upon completing Part A of the application and paying the full first premium, subject to appellant's right to terminate the contract if it became dissatisfied with the risk prior to the issuance of the policy.

ARGUMENT

I. Summary.

Appellee's position, in brief, is as follows:

a. A contract of insurance upon the life of Peter Grant went into effect upon execution of Part A of the Application, and delivery of the full first premium and the receipt. A reasonable layman would regard himself as insured upon payment of the premium; Peter Grant and appellee so regarded themselves. The provision in the Application and the Receipt with reference to home office approval is ambiguous; it can reasonably be construed to be a condition subsequent; the trial court was entitled, indeed compelled, under California law so to construe it. A contrary construction, which would permit the exaction of a premium without affording insurance coverage, is unconscionable and must be rejected under the declared public policy of California.

b. In the alternative, the evidence justifies the conclusion that appellant had approved Peter Grant for the insurance contract here involved prior to the execution of the application.

c. The trial court did not commit reversible error in its findings, conclusions, judgment or the admission or rejection of evidence or at all.

II. Preliminary Observations.

1. The Evidence.

The circumstances surrounding the solicitation of Peter Grant for insurance and the execution of the Application were related by appellee and by George Price, the appellant's agent. The testimony of Price was contradicted by appellee in numerous crucial respects; it was also impeached by his admissions on cross examination which differed radically from his testimony on direct. Thus, for example, he testified on direct that he showed Exhibit D to Peter Grant; but cross examination established that he could not conceivably have done so as he did not see the Grants during the approximately 10 days when that letter was in his possession. He also testified on direct that neither a family-protection type of policy nor insurance in the amount of \$10,000.00 was mentioned until just before the application was written but admitted on cross examination that Peter Grant wanted \$10,000.00 of insurance from the very beginning and that family protection was discussed long before August 10, 1954. It is clear that the trial court did and was entitled to disbelieve Price's testimony whenever it contradicted the testimony of appellee or an inference reasonably to be drawn from her testimony.

2. Appellant's Theory.

Appellant's basic theory is that the Application and the receipt must be construed as a matter of law to afford an applicant no coverage until the date of subsequent home office approval. Unless this Court adopts this illusory theory of "retroactive immediate coverage," this appeal falls by the wayside.

III. The Applicable Law.

1. *Ransom v. Penn Mutual Life Ins. Co.* Is the Binding Precedent.

Contrary to appellant's contention, this is not a case of first impression in California. This case is governed by the unanimous California Supreme Court decision in *Ransom v. Penn Mutual Life Ins. Co.*, 43 C.2d 420, 274 P.2d 633 (1954). Because the *Ransom* case is in all material respects on all fours with this case, it is here set forth in detail.

Ralph Ransom made a written application on the insurance company's printed form, paid the first premium in full and received a receipt. The wording of the receipt is not cited in the opinion. The application stipulated for coverage from the date of the application or of the medical exam whichever was later, provided a full first premium was paid at the time of the application and the company was satisfied of Ransom's acceptability under its rules. He was then examined by the company's physician. As the medical information pointed to the possibility of heart disease, the Company was unwilling to approve the risk without further inquiry; it therefore requested Ransom to submit to a further medical examination, but before this could be arranged, he was killed in an automobile accident. The company, having learned of Ransom's death, tendered back the premium to Mrs. Ransom and advised her that in view of

the physician's report, the application was rejected. The Supreme Court found in favor of Ransom, holding that a contract of insurance arose immediately upon receipt by the company of the completed application and the premium payment even though the company had not approved the risk by the date of death and even though the applicant had to perform another act, namely take another medical exam, before the company would consider the risk.

The Court's reasoning was as follows:

a. Language of the Application.

"If the first premium is paid in full in exchange for the attached receipt signed by the Company's agent when this application is signed the insurance shall be in force, subject to the terms and conditions of the policy applied for, from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the Proposed Insured was at that date acceptable under the Company's rules for insurance upon the plan at the rate of premium and for the amount applied for, but that if such first premium is not so paid or if the Company is not satisfied as to such acceptability, no insurance shall be in force until both the first premium is paid in full and the policy is delivered while the health, habits, occupation and other facts relating to the Proposed Insured are the same as described in Part I and Part II of this application and in any amendments thereto."

b. Issue.

"We must determine whether a contract of insurance arose immediately upon receipt by defendant of the completed application with the premium payment, subject to the right of defendant to terminate the agreement if it subsequently concluded that Ransom was not acceptable, or whether, as defendant contends, its satisfaction as to Ransom's acceptability for insurance was a condition precedent to the existence of any contract." (43 C.2d at 423)

c. Condition subsequent. The Court reviewed conflicting out of state decisions and concluded to follow those interpreting the application and receipt so as to effect immediate insurance subject to the right to terminate if the company becomes dissatisfied with the risk before a policy is issued. In other words, the Court construed the condition as a condition subsequent (43 C.2d 423-424). It is clear that the decision did not rest on the specific language of the receipt. Among the cases approved and disapproved appear every conceivable variation and type of receipts, both "if" and "provided", both so called "approval" types and "insurable risk" types. The court simply held that if at all possible, the condition must be construed as subsequent rather than precedent.

d. Ambiguity. There is an ambiguity in the receipt which may lead the ordinary applicant to conclude that he is insured if he pays the premium in advance :

"An application must be construed as it would be taken by the ordinary applicant, and such a person would assume that he was getting immediate insurance for his money and would not understand that he was left uncovered until the insurer at its leisure approved this risk." (43 C.2d at 424)

and again :

"The understanding of an ordinary person is the standard which must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy". (43 C.2d at 425)

e. Unconscionableness.

"There is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be unconscionable to per-

mit the company, after using language to induce payment of the premium at that time, to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer." (43 C.2d at 425)

and again:

"If the company did not intend that the insurance should be effective from the date of the application it would be obtaining a premium for a period during which there was no insurance, and this would not be dealing honestly with the insured." (43 C.2d at 424)

f. Medical Insurability. The Court expressly held that Ransom's health or medical insurability at the time of the application was irrelevant. A contract, subject to termination, arose at that time; and the only question was whether the Company has communicated a disaffirmance before its obligation became fixed by Ransom's death (43 C.2d at 425).

In short, the Supreme Court held that a contract of insurance arose immediately upon defendant's receipt of the completed application and the payment of the first premium, even though the defendant was at that stage unable to determine whether it would ultimately approve the risk. The decision rested on two independent grounds: (1) the application and receipt were ambiguous and would lead the ordinary applicant to believe he was insured upon paying the premium. The understanding of an ordinary person is the applicable standard. Ambiguities must be construed against the party causing them. If the application lends itself to the construction that the insurance is immediately effective, it must be so construed. (2) It would be unconscionable to permit an insurer, after using language to induce payment of the premium at the time an application is taken, to escape the obligation which the ordinary appli-

cant would reasonably believe had been undertaken by the insurer. Collection of a premium for a period during which no insurance is in effect is not dealing honestly with the applicant. *The insurance company had the alternative of exacting an early premium and affording immediate coverage or refraining from demanding any payment until issuance of the policy.* The Court relied heavily on *Gaunt v. John Hancock Mutual Life Ins. Co.*, 160 F.2d 599 (2 Cir. 1947) in which Judge Learned Hand, speaking for the Court, relied on both ambiguity and unconscionableness and Judge Charles E. Clark in a separate concurrence thought that the decision should be placed squarely on unconscionableness.

The *Ransom* case has been carefully analyzed in 7 Stanford L. Rev. 292 (1955) and this general subject in a comment in 63 Yale L. J. 523 (1954) appropriately headed, in the light of the pre-*Ransom* cases: "the Mystery of the Non-Binding Binder."

2. Appellant's Authorities Are in Conflict with Binding California Law.

In construing binding receipts, two lines of authority have developed. The "majority rule" holds that subjective standards of "approval", "satisfaction" or "acceptability" are conditions precedent to the existence of a contract. The "minority rule" (the modern trend) holds that such standards are conditions subsequent. The *Ransom* case adopts the minority rule. The *Ransom* case is a binding authority. Decisions conflicting with the ratio decidendi as well as with the spirit of the *Ransom* case must be disregarded.

The authorities relied on by appellant cannot be reconciled with the *Ransom* case. The *Hyder, Hutchinson* and *Kammerer* cases strictly construe "binding receipts" in favor of the insurance company. They give no weight to a

provision of a binding receipt which states "insurance shall be in force from this date". Utterly repugnant conditions of "approval", "satisfaction" and the like are preponderated to excise the essence of the receipt: "insurance shall be in force from this date". They give judicial blessing to a practice which permits an insurance company to collect a premium without insuring. The *Ransom* case liberally construes the conditions of such receipts; the *Ransom* case adopts the "understanding of an ordinary person" as the standard of construction; the *Ransom* case gives weight to a provision that states that insurance shall be in effect from a stated date; the *Ransom* case gives weight to a condition of "satisfaction" by construing it as a condition subsequent; the *Ransom* case condemns as "unconscionable" the premium collection practices which appellant asks this Court to approve; the *Ransom* case expressly rejects the "majority rule" of the cases upon which appellant relies. Note that *Ransom* expressly disapproved of *Mofrad v. New York Life Ins. Co.*, 206 Fed. (2) 491 (10th Cir. 1953) relied on by appellant in its Brief.

Nor is this Court free to follow *Corn v. United American Life Ins. Co.*, 104 F. Supp. 612 (DC Colo. 1952). In the first place, the *Corn* receipt was construed so as to make approval and insurability conditions precedent to coverage. That decision therefore joins the numerous cases which the *Ransom* case expressly refused to follow. In the second place, the *Corn* receipt like the *Ransom* receipt dated interim coverage from the completion of Parts I and II of the Application so that the taking of the medical exam was obviously required. There is no such requirement in the Grant receipt or application.

But the real rationale of the *Corn* case is set forth at p 615 of the opinion:

“Diligent search has failed to reveal a single authority which recognizes the existence of interim insurance where the alleged insured himself had failed to take steps upon which the agreement of the parties conditioned liability.”

Two years later, diligent search would have led to the *Ransom* case. There the insurer demanded that the applicant submit to another medical examination—clearly the performance of a further act—before the insurer would consider the acceptability of the risk. Nevertheless, interim coverage was held to be in effect.

Lloyd v. Franklin Life Insurance Company, 245 F.2d 896 (9th Cir 1957), does not aid appellant; in fact, it supports appellee. There the beneficiary expressly requested in the application that the policy be not backdated to the date of the application but should take effect on some subsequent date. He committed suicide within two years of the policy date. The court held that, by express agreement, the parties prevented the backdating of coverage:

“The mere fact that there was a binding contract on December 11, 1952 did not prevent the parties from postponing coverage and date of issue until January 1, 1953 by express agreement.” (245 F.2d at 900)

On p 901 of the Opinion, the Court states that there may very well have been interim coverage from the date of the medical exam (the receipt, as in the *Ransom* case, dated interim coverage from application or medical exam, whichever was later), that such coverage was in addition to the policy (!) but that the beneficiary was not aided thereby as the 2-year suicide exception was contained only in the policy and the policy was not backdated to the medical exam. It is quite clear from the general tenor of the opinion that the Court would not have listened to appellant's contention that there is not such thing as interim coverage under a receipt but that the policy, if and when issued, is merely backdated.

3. Comparison of Ransom and Grant.

In an effort to evade the principle of the *Ransom* case appellant makes a comparison which in effect "imports" certain *Ransom* facts into this case.

a. Appellant notes that in *Ransom* both Part I (comparable to our Part A) and Part II (comparable to our Part B) of the application were completed. The inference is that because Part B of the Grant application was not completed, the *Ransom* rules do not apply. But, of course, a "completed" application for purposes of temporary insurance was one thing in *Ransom* and quite another here.

Under the *Ransom* application *insurance was in force from the date of Part I or of Part II, whichever was later*. Obviously, if both Part I and Part II were not complete there would have been no insurance and no case.

Under the Grant application and receipt, insurance was in force from the date of the receipt; there was no language postponing insurance until Part B or Part C was completed. The receipt stated "Received of Peter Grant Fifty-three & 36/100 Dollars *on account of application made this date* * * *" There was only one application that was or could have been made by Peter Grant at the time the receipt was issued. That was Part A, and that was completed.

b. The *Ransom* application was received at the insurer's home office. Appellant argues that *Ransom* doesn't apply here because the Grant application and premium were not received at appellant's home office. The Court in *Ransom* did not hold that either the application or premium had to be received at the insurer's home office. The court stated that the contract arose "upon the *defendant's receipt* of the completed application and the first premium payment". No reference is made to the "home office". Obviously, "receipt" by an agent would be "receipt" by an insurer.

Finally it is interesting to note that Ransom did not "pass" his medical examination. The insurer was not "satisfied" with the medical report and requested a further medical examination which Ransom never took. The results of the medical examination were immaterial; the evidence of a heart condition was immaterial; Ransom was insured. The taking of a medical examination and the completion of both Part I and Part II were material only because insurance was not in force, by the express terms of the application, until both Parts were complete.

IV. Part A of the Application and the Receipt Effected Immediate Temporary Insurance.

Appellant chooses to ignore what is apparent from a cursory glance at the Application and the Receipt: it is a document having two functions: Part A and the receipt are of themselves a contract of temporary insurance on the life of Peter Grant: with Part B, they constitute an application for a formal policy of insurance on a permanent basis. The receipt was clearly intended to afford coverage prior to execution of the policy, it was, in insurance terminology, a "binder receipt" defined in *Meadows v. Emmett and Chadler*, 86 C.A. 2d 1, 7, 193 P.2d 785 (1948) as

"a written instrument, used when a policy cannot be immediately issued, to evidence that the insurance coverage attaches at a specified time, and continuing, subject to a maximum limitation, until the policy is issued or the risk is declined and notice thereof given".

Binder receipts in life insurance applications are the rule rather than the exception today. Note, "Binding Receipts" in California, 7 Stan. L. Rev. 292, 293 (1955).

Part A and the Receipt are obviously contractual in nature. They are phrased in contractual terms: "it is agreed

that * * *"; they contain all the elements of an insurance contract: the insurer, the insured, the beneficiary, the premium and the amount and plan of insurance.

The standard of construction is the understanding of an ordinary man. But, at the outset, we propose to demonstrate that even a legal purist, bent on technically examining the facts of this case, would conclude that appellant sold and Peter Grant bought immediate insurance.

1. Neither Part B Nor Part C of the Application Was Part of the Contract of Temporary Insurance, Nor Was Either a Condition Precedent or Otherwise Essential to the Effectiveness of That Contract.

(1) The receipt which was given to Peter Grant, and which is contractual in nature, was detached from Part A. It was delivered coincidentally with the signing of Part A and the delivery of the check. Its delivery was not conditioned upon the completion or signing of Part B or Part C. In short, the format and content of these papers and the acts of the parties establish that a contract was made by them even though Parts B and C were not completed.

(2) Part A provides in part: "It is agreed that: 1. The statements and answers in Part A and Part B of the application for this insurance shall form the basis of the contract of insurance, *if one be issued*. Obviously, this refers to the formal policy of insurance *to be issued*: it does not qualify the contractual nature of Part A and the receipt. The receipt does not refer to Part B or Part C. Had appellant intended that Part A would not be effective until Part B was completed, would not Part A or the receipt provide in effect "Part B must be completed before Part A is effective"? Appellant's careful selection of language in one part dealing with a contract *to be issued* and its failure to use it in another part respecting insurance "in force from this date" shows the duality of Part A: (1) Part A is a contract

of temporary insurance and (2) with Part B, it is an application for a formal policy of insurance on a permanent basis.

(3) The effective date of the insurance was geared solely and expressly to the date of signing Part A. There is no language in Part A, Part B or Part C which either defers or conditions the effectiveness of the insurance until Part B or C is completed. Neither the collection of the premium nor the issuance of the receipt was deferred to or conditioned upon the completion of Part B or Part C. If the temporary insurance obviously provided by Part A was in any way dependent upon the completion of Part B or Part C why was signing of Part A selected as the effective date; why wasn't collection of the premium and the issuance of the receipt deferred until Part B was completed; why didn't Part A or the receipt provide *as in the Ransom case* "the insurance shall be in force from the date Part A or Part B is signed, *whichever is later*"?

(4) The first sentence of the receipt (Plaintiff's Exhibit 2) reads: "Received from Peter Grant Fifty-three and 36/100 Dollars on account of *application made this date* to the Metropolitan Life Insurance Company". The only application that was or could have been made "this date" was the form Part A. Had appellant intended that the application for the purpose of a temporary contract of insurance included Part B or Part C, it would have stated "on account of the application, consisting of Part A, Part B and Part C". Here again the receipt is noteworthy for its omissions; nowhere in that document is Part B or Part C mentioned. In Part A the appellant carefully conjoined Part A and Part B in reference to a contract "to be issued" (i.e. the policy); but in respect to the contract made when Part A was signed and the receipt issued, Part B and Part C were ignored. The omission must have been deliberate. That significant

omission is consistent only with a contract of temporary insurance effective when Part A was signed and the receipt was delivered.

(5) Even though the execution of Parts B and C (the taking of a medical examination) is in no way a condition to the effectiveness of temporary insurance, appellant attempts to graft such a condition into the contract by asserting that Peter Grant and appellee were aware of that nonexistent condition precedent (Appellant's Opening Brief pp 27-29).

The first short answer is that appellee's "awareness" cannot create a condition where none is set forth in the document. The second is that there was no such awareness. It is true of course that both Peter Grant and appellee knew that a medical exam must be taken for "this insurance"; but by "this insurance" they obviously referred to the final issuance of the policy. Appellee's statement does not reflect an awareness that interim coverage would not be afforded. George Price has told them: "the Company will insure you"; they assumed that they were covered when the premium was paid. They knew that they were not insured until the premium was paid. Therefore, Grant made a special trip to Salinas so that there would be funds in his account sufficient to cover the check if it was presented on its due date. Would he conceivably have made a special trip if he had assumed that he was in any event not covered until some indefinite future date? And it is quite significant that when Price asked Grant on August 10 to make an appointment with appellant's physician for the next day, the latter replied that he was too busy (R 72). Grant was too busy to take a medical exam that day in his home town but not to make a special trip to Salinas. *The inference is clear that he knew payment of the premium but not taking of a medical exam to be a condition precedent to interim coverage.* That con-

struction of the receipt would be reasonable not only for a layman but also for a lawyer. Unlike the Ransom receipt which dates interim coverage from "the date of Part I or Part II of this application, whichever is the later", the risk in this case is geared entirely to execution of Part A. Where appellant chose, by the terms of the paper it drew, to undertake the risk from the date of Part A, what difference did it make whether Peter Grant was medically acceptable or unacceptable? That being so, what difference did it make whether a medical examination was taken or whether Parts B or C were completed?

2. Part A of the Application and the Receipt Are Ambiguous; the Ambiguities Must Be Resolved Against the Appellant.

In determining whether home office approval was a condition precedent to interim coverage, the Court must keep in mind the well established California rule that stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result.

Alpha Beta Food Markets v. Retail Clerks, 45 C.2d 764, 771, 291 P.2d 433 (1955);

Brubacker v. Beneficial Life Ins. Co., 130 C.A. 2d 340, 347, 278 P.2d 966 (1955);

Larson v. Thoresen, 116 C.A. 2d 790, 794, 254 P.2d 656 (1955).

And under the *Ransom* case, the contract must, if possible, be construed to afford coverage as soon as the premium is paid because that is how an ordinary applicant would construe it.

The clause in question is rich in ambiguity:

(1) Payment of the premium necessarily had to precede or coincide with the issuance of the receipt. If, as appellant

contends, approval cannot be given until the completed application is received, then approval at the Company's Home Office necessarily had to be subsequent to issuance of the receipt. Even if appellant's president solicited the insurance, gave the receipt and approved the application in Peter Grant's home, the insurance would not be effective, if approval is a condition precedent, because approval did not take place "at the Company's Home Office". *If an act subsequent to the issuance of the receipt—approval at the Company's Home Office—was intended as a condition precedent, how could the insurance be in force from the date of the receipt?* Either the insurance was in force from the date of the receipt and would be paid if death intervened or it was not. There can be no middle ground. If the insurance was not in force when Peter Grant died, the receipt was an instrument of deception; it was a snare for the unwary.

(2) Part A of the application states: The Company shall incur no liability * * * until a policy has been delivered * * * except as follows: If * * * the full first premium * * * is paid * * * *at the time Part A of this application is signed*, and if this application is approved * * * then the insurance * * * shall be in force from the date hereof. By the express terms of the application, payment of the premium is the only thing which must be done at the time Part A is signed for insurance to be in force "from the date hereof." Approval comes later. This is basically identical to the *Ransom* clause which caused the Supreme Court to rule:

"The clause quoted above is subject to the interpretation that the applicant is offered a choice of either paying his first premium when he signs the application, in which event "the insurance shall be in force * * * from the date * * * of the application", or of paying upon receipt of the policy, in which event "no insurance shall be in force until * * * the policy is delivered."

(3) The fourth line of the receipt states in part "but otherwise no insurance shall be in force under said application unless and until". This statement is a tacit admission that insurance is in force under Part A and the receipt. The question then is: on what date was that insurance in force? The only date mentioned is August 11, 1954. If appellant had intended that insurance would be in force only from the date of Part B or Part C or from the date of approval, then most assuredly that date rather than the date of the receipt would have been stated. If appellant did not intend to insure Peter Grant from the date of the receipt, then there is a clear ambiguity.

(4) The sixth to the eighth lines of the receipt read in part "but otherwise no insurance shall be in force unless and until a policy has been delivered * * * *during the lifetime and continued insurability of the applicant*".

There is but one possible inference from the use of the phrase "during the lifetime * * * of the applicant". *Peter Grant did not have to survive the completion of Part B, the medical examination or approval at the Company's Home Office.* Otherwise, appellant would have written into the third line of the receipt after the phrase "is approved at the Company's Home Office" the words "during the lifetime of the applicant".

The sole implication of the phrase "continued insurability of the applicant" in the eighth line of the receipt is this: appellant assumed that Peter Grant was insurable at the date of the receipt and for immediate payment of the premium, temporarily assumed the risk if he were not. Why is the word "continued" used unless it refers to a condition which appellant assumed existed at the date of the receipt? The word "continued" obviously refers back to the date of the receipt. It obviously encompasses the period from the date of the receipt to the date of approval; its use is pur-

poseless unless it assumes insurability on the date of the receipt.

Each of the cited ambiguities could have been readily corrected by appellant. If the completion of Part B, the taking of a medical examination or approval at the Company's Home Office were a condition precedent to appellant's obligation, each such requirement could have been simply, directly and plainly stated. Thus the receipt could have stated simply that no insurance coverage shall be in effect until the policy is delivered but that upon being delivered, the policy shall for all purposes bear the same date as Part A of the Application. Instead appellant chose the deceptively inconsistent language the "insurance * * * shall be in force from this date". Under such circumstances, should appellant be permitted to blow hot while Peter Grant lived and blow cold when he died?

3. Peter Grant and Appellee Reasonably Believed That Peter Grant Was Insured When He Paid His Premium.

Appellee testified that Mr. Price told her and her husband that the defendant would insure him and that they assumed that the insurance was in effect when the premium was paid. Appellee was an obviously truthful witness; she scrupulously abstained from overswearing. Her understanding, too, would be that of an "ordinary person". On August 10th, 1954, her understanding was not only reasonable but inescapable. Consider the circumstances.

a. Mr. Price made the first approach. For two months, he solicited Peter Grant to take out more insurance. During that time he was armed not only with 20 years of experience and training, but with forms, rate books and letters from the head office.

b. From the beginning, the concern of Mr. Price and the Grants was centered on the question of whether Peter Grant

would be accepted because of his occupation. In fact, that, with the consequent penal premium, was the only issue at all times. A "trial application" was taken. Why take a trial application unless it was contemplated by the parties that insurance would be effective when an application was taken and the premium was paid? If appellant had no liability under the application of August 11, 1954, why indulge in a prior "trial"? With that background any ordinary person would believe that the extra risk for which Peter Grant paid had been accepted and that Peter Grant was insured.

c. Appellant's head office participated in inducing the Grants' belief that Peter Grant was insured. It quoted a penal rate for whole life insurance. That letter was qualified. It was not shown to the Grants. A subsequent letter dated July 30th, 1954 quoted a penal rate on the term element of a family income policy; it referred to the rate book; it was not qualified in any way. That letter was the culmination of extended negotiations, a trial application and an aviation questionnaire. Certainly the Grants would believe that the risk had been approved and that Peter Grant was insured when he paid the penal premium.

d. On August 10th, 1954 Mr. Price did not tell Mr. Grant that he was then insured; on the other hand, Mr. Price did not tell Mr. Grant that he was not insured. Mr. Price took Peter Grant's check and gave him a receipt. Simply stated, that receipt said to the ordinary person "your insurance is in force from this date". Mr. Price did not have to say anything; the receipt said it for him. And Mr. Grant's special trip to Salinas confirms his understanding of the transaction.

e. Mr. Price himself believed that the payment of the premium was the only condition precedent to insurance coverage. When he called on appellee after Peter Grant's death to return the check he stated "I never put it in the

bank. I never deposited it. So the insurance is not in force." What better standard of construction could be had than the agent's own understanding; he was apologizing; Peter Grant was not insured only because Mr. Price did not cash the check.

Under the *Ransom* case, the understanding of a reasonable man is the *legal standard* by which this transaction must be judged. The trial court was entitled, if not compelled, to find that the Grants regarded Peter Grant as insured when he paid the premium; and the record affirms the finding that the Grants were reasonable people. If the Grants were reasonable people, and if they construed approval as a condition subsequent, then under the applicable legal standard the application and receipt must be construed as affording immediate coverage.

4. The Trial Court Took Testimony to Construe the Contract; Its Construction Is Binding Upon This Court.

Appellant's contention to the contrary notwithstanding, (Appellant's Opening Brief p 48) the trial court did determine that Part A of the Application and the Receipt were ambiguous. That Court's opinion stated that there was little difference between this case and the *Ransom* case (R 37); the *Ransom* decision rests primarily on ambiguity. The trial court found that the Grants reasonably construed the Application and the Receipt as affording immediate coverage (Finding No. IX, R 40) and concluded that home office approval was a condition subsequent (Conclusion No. II, R 41-42). The Receipt does not say so in so many words and the Court spoke of a "reasonable" construction rather than a "necessary" construction. The trial court's findings reflect its view that the Receipt was ambiguous, and that, consistent with the rules of interpretation laid down in the *Ransom* case, the Receipt lent itself to the interpretation set forth in the Findings and Conclusions.

While the question whether a contract is ambiguous is in the first instance a question of law, the resolution of the ambiguity becomes a question of fact where evidence is introduced to explain it. In that event, the trial court's interpretation binds an appellate court unless it is clearly erroneous.

Dept. of Water v. Okonite-Callender Cable Co., 181 F.2d 375, 380 (9th Cir 1950) ;

Walsh v. Walsh, 18 C.2d 439, 443-4, 116 P.2d 62 (1940).

The trial court was enjoined by the *Ransom* case to ascertain how a reasonable man would construe the contract and the Court took evidence to ascertain the intent of the parties. It learned that the Grants assumed that they were insured when they paid the premium; that Price had said: "The company will insure you" without adding: "at some remote future date"; it learned of the extensive prior negotiations leading to the resolution of the only real issue, namely, the acceptance of the aviation risk; it learned of the special trip to Salinas and of Price's remark, when returning the check after Grant's death, that only his failure to cash the check precluded coverage.

In the light of the patent ambiguity in the receipt and the trial court's reasonable construction based in part on extrinsic evidence, its conclusion that home office approval was a condition subsequent is binding upon this Court.

5. Appellant's Construction of the Application Is Unconscionable.

(1) Peter Grant contracted to leave his money with appellant for 60 days:

"If the policy is not delivered to you within 60 days from date, this receipt should be presented at the District Office or the Home Office in New York, for refund". (Ex 2; R 245)

This was interest free money in the hands of appellant, which was of real value. If Peter Grant was not insured when he paid his money and got his receipt, appellant sold him something that was utterly valueless. And it doesn't make any difference whether the insurance was deferred for a few days until Part B was completed, or eight weeks until the Home Office acted. Peter Grant was deceived; he bought a "pig in the poke"; and he was unquestionably induced by appellant's agent, by appellant's papers, by appellant's words "insurance * * * shall be in force from this date". To sum up the matter with judicial nicety we turn to *Stonsz v. Equitable Life Assurance Society*, 324 Pa. 97, 187 Atl. 403, 406 (1936); (cited with approval in the *Ransom* case):

"If there was to be no contract of insurance in any event until the application was approved * * * and a policy issued thereon, it would seem entirely immaterial to the insured whether the contract related back to the date of the application or not. If he lived until the application was approved and a policy issued, it would seem a matter of indifference to him whether he had been insured during the interim between the date of the application and the date of the issuance of the policy. On the other hand, if he died before the application was approved and the policy issued, his beneficiary would derive no benefit from the insurance. The chief object of the provision would, therefore, seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk."

Under the *Ransom* case, appellant cannot escape responsibility merely by pleading there is no ambiguity; it must go further and justify its business practice:

"* * * There is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be *unconscionable* to permit

the company after using language to induce payment of the premium at that time to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer * * *” *Ransom v. Penn Mutual Life Ins. Co.* (43 Cal. (2) 420, 425)

In *Western & Southern Life Ins. Co. v. Vale*, 12 N.E. (2) 350, 354 (Ind 1938) (cited with approval in the *Ransom* case) the Court stated:

“* * * In other words, it is recognized that such a receipt is calculated to convey the impression to the applicant for insurance that he is insured, and to procure money from him as a premium for insurance over a period when he is not insured by law. Put otherwise, it means that, by a device calculated to deceive, the applicant is *defrauded* out of so much of the premium paid as would provide insurance for the period between the application and the acceptance and delivery of the policy * * *”

In *Albers v. Security Mut. Life Ins. Co.*, 170 N.W. 159, 160 (S.D. 1918) (cited with approval in the *Ransom* case) the Court stated:

“* * * If the company did not intend that there should be insurance effective pending the date of the application and the date of the approval of the risk and the issuance of the policy, then the company would be charging and obtaining the full amount of the premium for one year, while the period of actual insurance would be as many days less than one year as there were days intervening between the date of the application and the approval. *This would not be dealing honestly with the insured.* By the payment of the premium for one year an insured is entitled to insurance for one year * * *”

In *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 601 (2d Cir 1947) (cited with approval in the *Ransom* case) the Court stated:

“* * * An underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially. It is the understanding of such persons that counts; and not one in a hundred would suppose that he would be covered, not “as of the date of completion of Part B”, as the defendant promised, but only as of the date of approval. Had that been what the defendant meant, certainly it was easy to say so; and had it in addition meant to make the policy retroactive for some purposes, certainly it was easy to say that too. To demand that persons wholly unfamiliar with insurance shall spell all this out in the very teeth of the language used, is *unpardonable* * * *”

But, argues appellant, an insured derives certain benefits from the backdating of the policy to the date of the application which justify the exaction of a premium in the interim without affording coverage (Appellant’s Opening Brief, pp. 34-35). An identical argument was made in the Second Circuit and persuasively rejected by Judge Learned Hand in the *Gaunt* case, *supra* at 601. These benefits may constitute a peppercorn of consideration but they are not the consideration bargained for. The applicant is not getting the one thing he is paying for—insurance.

Daily, throughout this country, appellant is collecting thousands of dollars in premiums paid by applicants; appellant gives the applicant a receipt which states “* * * insurance * * * shall be in force from the date hereof”; if the applicant lives, the policy is dated back to the date of the receipt; if the applicant dies prior to approval of the application, appellant disclaims liability. In essence, appellant is collecting a premium for a period when, according to its view, there is no insurance in force. Essentially, appellant has placed in the hands of its salesmen a “selling device”

to induce the innocent to buy while covertly relying on legalisms and lawyers to protect it against its own "device" and its own agents. This is a paper version of the ancient "shell game": now you have insurance; now you don't.

And appellant's reliance on California Insurance Code § 10115 to justify its business practice is misplaced (Appellant's Opening Brief, pp. 43-45). To suggest that under that section insurance cannot be enforced prior to home office approval is a gross distortion. That section is a restraint on insurers, not a shield to protect them. It does not preclude an insurer from contractually assuming a liability prior to approval. This was conclusively established by the *Ransom* case which imposed liability before the company had approved the risk.

Nor does that section evidence the legislative policy as to what constitutes fair dealing. True, that section permits the issuance of a contract under which coverage may be made contingent on approval of the risk. But the conditions under which such a contract will be sustained are set forth in the *Ransom* case: the application must unequivocally apprise the applicant that protection is deferred; any ambiguity which reasonably leads an applicant to believe that he is immediately protected would transmute an approval clause into a condition subsequent.

6. The Full First Premium Was Paid.

George Price requested Peter Grant to pay the sum of \$53.36 and stated that it was the full monthly premium. He computed that extremely high premium on the basis of appellant's rate book and the letters of instruction he had received. He double checked his figures. Out of an abundance of caution, he assigned to Grant an "intermediate" rather than an "ordinary" rating. He entered in the application that the premium was to be payable monthly. He

acted under written instructions contained in the application itself that: "the full first premium must be obtained in advance if payable monthly." He thus was not only authorized but required by appellant's rules to advise the applicant of the amount of the premium. Therefore, his representation to the applicant, whether correct or not, is binding on appellant.

Price gave to Grant a receipt stating "Received the sum of \$53.36 * * *" On the date of the check, the receipt and the application, there were sufficient funds in Grant's bank account so that the check would have been honored. The check could have been cashed on its due date or on the next day. Appellant's failure to cash it may not be blamed on appellee.

Appellant complains of the failure to find that the check was returned after Peter Grant's death and that appellee made no subsequent tender of payment. Such a finding would have been immaterial. Appellant had the right to terminate the contract subsequent to August 11, 1954 but during Grant's lifetime. It did not do so. In the absence of such communication of termination, appellant's obligations became fixed by Grant's death. A subsequent return of the check cannot relieve appellant of its obligation.

And under the circumstances obtaining the day after Mr. Grant's death, no inference that appellee waived her rights can be drawn from her taking the check. The trial court was the best judge of that:

"While Grant's wife was under a doctor's care, the agent, having learned of the death of Grant, and said agent still having the check in his possession, rushed to the home of the Plaintiff, left the check and tried to get her to sign a receipt, which she refused to do. It appears from the evidence that she was in no physical condition to transact any business whatever. I will not

comment on this action by the agent except to ignore it as it is not material here." (Opinion of the trial court, R 36)

When appellant returned the check and unequivocally disclaimed liability, no further tender was necessary as it would have been futile.

Hossom v. City of Long Beach, 83 C.A. 2d 745, 750, 189 P.2d 787 (1948);

Cowan v. Tremble, 111 C.A. 458, 464-5, 296 P. 91 (1931);

Passow v. Harris, 29 C.A. 559, 562-3, 156 P. 997 (1916).

7. The Trial Court's Decision Is Based on Its Interpretation of State Law and Therefore Should Be Given Great Weight.

It is quite clear from the trial court's Opinion and the general tenor of the Findings of Fact and Conclusions of Law that that court regarded itself as bound by the *Ransom* case; it viewed *Ransom* as proclaiming the California rule that it would be unconscionable to deprive an insurance applicant of interim coverage pending home office approval where the receipt would reasonably lead him to believe that he was insured from the date of the premium payment. Under such circumstances, federal appellate courts have frequently held that they will not reverse a trial judge who has reached a permissible conclusion as to a doubtful question of state law.

Steele v. General Mills, 329 U.S. 433, 439, 67 S. Ct. 439, 91 L.Ed. 402 (1947);

Chicago & N. W. RR. Co. v. Bork, 223 F.2d 652, 657 (8th Cir 1955);

Western Auto Supply v. Sullivan, 210 F.2d 36, 43 (8th Cir 1954);

Heikes v. N. Y. Life Ins. Co., 171 F.2d 460, 464 (8th Cir 1948).

Upon the foregoing grounds, it is submitted that Conclusion No. II (R 41-42), the determinative conclusion, is correct in law and that Findings Nos. VIII and IX, the determinative Findings, are amply sustained by the evidence.

V. The Court Can Find That Peter Grant Was Approved.

Neither "approval" nor proof of approval requires a document stating "we approve". Approval can be inferred from the evidence. The circumstances preponderate in favor of that inference.

No printed limitations on the authority of appellant's agent can assist appellant. Its home office directly participated in the negotiations with Peter Grant.

By July 30, 1954, the home office was fully informed through the trial application, the aviation questionnaire and correspondence about Peter Grant, his occupation and the plan of insurance desired. Though Price knew from the very inception of negotiations that Grant wanted \$10,000.00 of insurance we do not know whether that fact was communicated to the home office. But the Court can easily infer that the amount would make no difference. Exhibits D and F (R 253 and 255), set forth the extra premium for aviation and the family protection feature *per \$1000.00 of insurance*. The agent was thus instructed to make the identical computation regardless of whether insurance in the sum of \$2,000.00 or \$10,000.00 was sought.

With regard to Grant's health, the home office knew that he was a commercial pilot by occupation (Ex 5; R 248); it therefore was charged with knowledge and undoubtedly knew that he was required by law to take periodic physical

examinations at least as rigorous as appellant's insurance examination and that he would have violated the law had he flown while not in excellent health. (Code of Federal Regulations, Title 14, Part 43, §§ 43.41 and 43.42; Ex 1; R 244)

Admittedly, appellant was not prepared to approve Peter Grant as of July 20, 1954 (Ex D; R 253). But twenty days elapsed between that date and the date of the application. The subsequent letter of July 30, 1954 (Ex F; R 255) contained no language of condition or reservation. Thereafter, Price told the Grants that the company will insure Peter Grant. While Price had no authority to make a contract for appellant, he certainly had authority to communicate to the applicant the home office's decision; in fact, he is the logical medium through whom approval would be communicated, and his statement is sufficient evidence to establish such approval.

The trial court made no finding on the issue tendered by plaintiff's second cause of action that appellant had approved Peter Grant prior to August 11, 1954 as to the plan, class and amount of insurance provided in the contract. It merely found that it had so approved him as to his business (Finding No. VII; R 39-40) and that it had fully informed itself of his needs for insurance and of the factors bearing upon his acceptability as an insurance risk (Finding No. V; R 39)

The law is clear that an appellate court is required to sustain a judgment upon any theory which is supported by the evidence regardless of whether or not the trial court addressed itself to that theory.

Jaffke v. Dunham, 352 US 280, 281, 77 S. Ct. 307, 16 L.Ed. 2d 314 (1957);

American Surety Co. of N. Y. v. Brummel, 184 F.2d 935, 936 (10th Cir. 1950);

McBrine Co. v. Silverman, 121 F.2d 181, 182 (9th Cir. 1932);
Yangtze Co. v. Deutsch-Asiatische Bank, 59 F.2d 8, 12 (9th Cir 1932);
McCloskey v. Pac. Coast Co., 160 F. 794, 801 (9th Cir 1908).

VI. No Prejudicial Error Was Committed in Evidentiary Rulings or in the Findings.

Only Appellant's Specifications of Error Nos. 6, 9 (last sentence of Finding No. IX as being a conclusion), 12, 22, 23 and 24 remain for consideration.

1. Peter Grant Was at All Relevant Times in Good Health; Finding of Fact No. VI Is Proper and Sustained by Admissible Evidence.

On June 8, 1954, Dr. Sambuck subjected Peter Grant to a medical examination at least as thorough and complete in every particular as appellant's insurance examination. He found Grant to be in good health⁴ and would have noted no derogatory information on Parts B and C of Exhibit 1.

Appellant's motion to strike Dr. Sambuck's testimony was taken under advisement by the trial court; and as the motion was not renewed, it is deemed waived.

Paramount Productions v. Smith, 91 F.2d 863, 866 (9th Cir. 1937);

Clauson v. U.S., 60 F.2d 694, 695-6 (8th Cir. 1932);

Ewert v. Thompson, 281 F. 449, 452 (8th Cir. 1922);

D'Avanzo v. Manno, 16 C.A. 2d 346, 348, 60 P.2d 524 (1936).

4. In a characteristic distortion of the evidence, appellant states that Dr. Sambuck's Medical Certificate shows a "physical deficiency" (Appellant's Opening Brief p. 59). Actually, what the Certificate states is the following: "Holder shall wear correcting lenses while exercising privileges of his airmans certificate." (R 249)

Between June 8, 1954 and the date of his death, Grant did not visit a physician; he was ill only one day with a stomach ache and the flu. Appellee testified that her husband was in good health on August 10, 11, 12 and 13, 1954. Grant was piloting an airplane immediately prior to his death. He would have violated the law had he so flown while not in good health. The presumption is that he obeyed the law. Cal. Civil Code § 1963(1)(33). A presumption is evidence in California sufficient to sustain a finding. *Abrams v. Stone*, 154 C.A. 2d 33, 39, 315 P.2d 453 (1957). Finding of Fact No. VI is amply supported by the evidence.

While the *Ransom* decision rests on the court's conclusion that Ransom's medical insurability was irrelevant to interim coverage, the opinion does state that he was in fact in good health. In the case at bar, if this Court concurs in the trial court's conclusion that approval of the risk must be viewed as a condition subsequent, Grant's health was immaterial. Appellee introduced evidence on this subject, however, out of an abundance of caution and to show that appellant did not saddle itself with an uninsurable risk. It is completely beyond doubt that Grant did not die of sickness or medical disability of any sort.

At worst, the above Finding and evidence are immaterial. The presumption, of course, is that the trial court's judgment is based only on proper evidence and that the court ignored improperly admitted testimony.

Ferguson v. Post, 243 F.2d 144, 145 (2d Cir. 1957);
Morris v. Williams, 149 F.2d 703, 708 (8th Cir. 1945);
MacDonnell v. Capital Co., 130 F.2d 311, 318 (9th Cir. 1942).

An irrelevant or unnecessary finding will also be ignored if the judgment is otherwise sustained by sufficient findings based on proper evidence.

J. P. Gibbons, Inc. v. Utah Home Fire Ins. Co., 202 F.2d 469, 474 (10th Cir. 1953).

In order to sustain this judgment, it is merely necessary for this Court to conclude that the trial court's Findings Nos. VIII and IX are sustained by the evidence.

2. No Prejudicial Error Was Committed in the Exclusion of Evidence.

Appellant assigns as error the action of the trial court in striking Mr. Svendsen's answer: "That is right" to the question "If that application had been completed would it have come to your division?" (Specification of Error No. 23) and the court's further action in striking his answer: "Yes sir" to the question: "Does the weight of an applicant, Mr. Svendsen, have anything to do with the classification?" (Specification No. 24) Neither ruling was prejudicial.

In the first place, if this Court concurs in the trial court's determination that approval was a condition subsequent, neither Specification No. 23 nor Specification No. 24 is reached. The mechanics of approval and the factors bearing on medical classification are obviously irrelevant; the only issue is whether appellant had communicated its termination of the contract prior to Peter Grant's death; and that issue is resolved by Finding of Fact No. X (R 40, 41) and the uncontradicted evidence.

Even if approval were a condition precedent, the exclusion of the testimony set forth in Specification No. 23 is not prejudicial. Appellant's District Manager Wigham testified that the application was not completed (R 164, 165), and that after an application is completed it goes directly to the San Francisco head office (R 166). It was stipulated that the application was still at appellant's examining physician's office at the time of Peter Grant's death (R 235). And the entire correspondence between appellant's district and head

offices, especially Exs B, D & F (R 251, 253, 255), makes clear that Svendsen was the home office man in charge of this case. Thus, the excluded testimony was merely cumulative and its exclusion was not prejudicial.

Larimer v. Smith, 130 C.A. 98, 104, 19 P.2d 825 (1933);

Silvery v. Harn, 120 C.A. 561, 573, 8 P.2d 570 (1932).

The evidence set forth in Specification No. 24 is obviously incompetent and irrelevant. Note that the question addressed itself not to insurability but merely to classification. The only possible relevance of that question goes to the amount of the premium. In the first place, though the evidence showed Peter Grant to have been healthy and not obese, Price computed the premium on the basis of an "intermediate" and not an "ordinary" classification. And as Price was not only authorized but instructed to communicate and demand the full premium, his determination is binding on appellant and may not be contradicted by an admittedly uncommunicated computation. Moreover, weight classifications are set forth in the rate book so that Svendsen's testimony would not be the best evidence and therefore incompetent.

3. Listing Findings Among the Conclusions or Vice Versa Is Not Determinative.

Appellant objects to the use of the word "contract" in Findings Nos. II, X and XII (R 38, 40, 41) and contends that the last sentence of Finding No. IX (R 40) is a Conclusion of Law.

As previously shown, the establishment of a contract, where testimony is introduced for purposes of interpretation, tenders an issue of fact. Also, the reasonableness of the Grants' construction of the contract is in our opinion an ultimate fact.

At any rate, in view of the shady line of demarcation between an ultimate fact and a conclusion, it has always been the law that the courts will look to the real nature of the statement, regardless of whether it is placed among the findings or the conclusions.

Benrose Fabrics Co. v. Rosenstein, 183 F.2d 355, 357 (7th Cir. 1950);

Linberg v. Santo, 211 C. 771, 776, 297 Pac. 9 (1931);

Gossman v. Gossman, 52 C.A. 2d 184, 191, 126 P.2d 178 (1942).

Even if all of the above statements are conclusions, the trial court made ultimate findings more than sufficient to sustain the judgment.

CONCLUSION

The law of California as laid down in the *Ransom* case and as applicable to this case does not impose any harsh or unreasonable hardships upon the insurance carrier. The risk assumed by the collection of a premium to cover the period prior to approval or rejection is a statistically small one; the chances are slight, indeed, that an applicant is (a) uninsurable and (b) will die during the relatively short interval between the taking and the approval or rejection of the application. That risk is voluntarily and contractually assumed. The insurer need not assume it; if he wishes to avoid this small risk, he need merely refrain from collecting a premium before he is prepared to issue a policy. The premium paid for the interim period is a substantial one; the insurer insists on exacting it in every instance and manifestly derives a considerable benefit from it. The applicant regards himself as insured when he pays the premium; such immediate insurance is the only consideration bargained for, it is the only promised benefit which

induces him to part with his money. We invite the Court to speculate as to how many advance premiums would be collected if soliciting agents would frankly inform applicants that they are not insured until approval and that they receive nothing for their money but certain ephemeral benefits which are intelligible and persuasive, in Judge Learned Hand's words, only to the underwriting craft.

Peter Grant paid an advance premium in reliance on immediate coverage. Appellant solicited, in fact, demanded that premium. It is beyond question that the application would have been approved but for Grant's untimely accidental death. That precise risk was undertaken by appellant for good and sufficient consideration. Having accepted the benefits of its bargain, appellant may not now unconscionably disaffirm its obligation.

The trial court so ruled; and its decision is buttressed by sufficient findings based on substantial evidence and is correct in law.

Appellee respectfully submits that the judgment should be affirmed.

Dated: March 16, 1959.

WYCKOFF, PARKER, BOYLE & POPE

By PHILIP T. BOYLE

And HARRY F. BRAUER

Attorneys for Appellee

No. 16,130

IN THE

United States Court of Appeals
For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

MARGARET L. GRANT,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

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FILE

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PAUL P. O'BRIEN,



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No. 16,130

IN THE

**United States Court of Appeals
For the Ninth Circuit**

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant,

VS.

MARGARET L. GRANT,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

There appear to be only a few points raised in Brief of Appellee that call for comment here.

Appellee contends that, because the trial court took testimony to construe the contract, its construction is binding upon this Court. (Brief of Appellee, pp. 30-31.)

A. THIS COURT IS ENTITLED TO AND SHOULD CONSTRUE AND INTERPRET THE DOCUMENTS CLAIMED TO CONSTITUTE A CONTRACT OF INSURANCE.

It should be noted that at the trial Appellee introduced extrinsic evidence not for the purpose of vary-

ing the terms and conditions of the alleged contract (Exhibits 1 and 2) but to explain the terms thereof. (R. 92, 168-170.)

California Jurisprudence, in discussing the extrinsic evidence rule as a rule of exclusion, states an exception as follows:

“The rule of exclusion does not apply where the extrinsic evidence offered is not inconsistent with and does not change, contradict or conflict with the terms embodied in the instrument, but merely explains them. . . .”

18 *Cal. Jur.* 2d 739.

The foregoing is the exception upon which Appellee relied to explain about Mr. Grant having a medical examination. The conversation took place the evening of August 10, 1954, and Appellee, on direct and cross-examination, in her case in chief, established that Mr. Grant knew he had to have a medical examination “for this insurance” and that later she made the arrangements for such examination. (Appellant’s Brief, pp. 5-8.)

B. THE DOCUMENTS ARE CLEAR AND UNAMBIGUOUS.

The reference in Brief of Appellee, page 30, to the trial court’s opinion does not refer to any specific finding or conclusion concerning ambiguity. At no time during the trial of this case did the trial court indicate in its comments or rulings, or otherwise, that it found or viewed the application and receipt, or either of them, to be ambiguous.

The trial court, in its opinion, said (R. 37), "I find very little difference in this case and the case of *Ransom v. Penn Mutual*."

Statements in the memorandum opinion of the trial court may not be used to ascertain the evidence or the facts or to control or modify the findings of fact upon which the judgment is based. Resort cannot be had to the opinion to eke out findings of fact.

American Insurance Co. v. Scheufler (8 Cir. 1942), 129 F. 2d 143, 146;

Bing v. Bing (1959), 168 A.C.A. 430, P. 2d

.....

Citing the trial court's comment (Appellee's Brief, 30) as a finding of ambiguity begs the whole question. Appellee has failed to show why this Court should not construe Exhibits 1 and 2 as other courts have done. This particular type of application and receipt never have been construed by the Supreme Court of California. In *Ransom v. Penn Mutual*, 43 C. 2d 420, 274 P. 2d 633, the California Supreme Court construed an entirely different application. Appellee seeks to force that case to fit the evidence in this one, but it is like trying to fit a square peg into a round hole. Her argument on the application is like one who tears off one page of a voluminous newspaper and, displaying that one page, says "Here is the complete newspaper. That is all there is to it and you cannot consider the rest of it." Such argument and reasoning, of course, are specious.

An illustration appears in Brief of Appellee (pp. 22-28) where counsel takes part A of the application

and receipt and lifts a sentence out of the context here and there and then argues in a circle instead of taking the document as a whole and giving weight to the clear and unambiguous language.

Where extrinsic evidence is uncontradicted and is in accord with the terms of the contract, the appellate court is not bound in any way by the interpretation thereof by the trial court.

Milton v. Hudson Sales Corp. (1957), 152 C.A. 2d 418, 433-434, 313 P. 2d 936, 946.

Appellee briefly passes over California Insurance Code §10115. This Court, however, has given it consideration. (See *Lloyd v. Franklin Life Insurance Company* (9 Cir. 1957), 245 F. 2d 896.)

C. NO ASSUMPTION BY MR. GRANT.

There is no evidence that Mr. Grant made any assumption that the insurance would be effective when the premium was paid. Please refer to Brief of Appellee, page 7, where it says: "Mr. and Mrs. Grant assumed that it was in effect when the premium was paid", and Footnote 3.

The statement to the effect they both assumed the insurance was in effect when the premium was paid is incorrect and is not supported by the portion of the record quoted on page 7 of the Brief, or any other part of the Record itself. After Mrs. Grant testified, "No, we assumed" she was given every opportunity to explain by the next question: "What is that?" and

she answered: "I assumed that it was in effect when we paid the premium." That testimony does not establish that Mr. Grant assumed anything about when the insurance applied for would be effective. What Appellee assumed is of no moment because she was not a party to any contract. She was named as beneficiary in the application but Mr. Grant reserved the right to change the beneficiary. (See Exhibit 1, part A, No. 19(a).) Under those circumstances Appellee was merely a third party beneficiary with no interest in the contract during Grant's lifetime but had a mere expectancy.

McEwen v. New York Life, 23 C.A. 694, 139 P. 242.

D. JULY 20, 1954 LETTER WAS SHOWN TO MR. GRANT.

Another matter of evidence should be clarified. On page 5 of Brief of Appellee there is discussion of Exhibit D: the letter of July 20, 1954. There is a footnote on this subject and above that the statement is made, "This letter was not shown to the Grants." That is misleading. The fact is that Mr. Price showed the letter to Mr. Grant. Appellee admits that in the footnote. It is immaterial whether it was shown to Mrs. Grant for she was not a party to the alleged contract. She admitted there were conversations between Grant and Price she did not know about. (R. 133.) Exhibit E, letter of Mr. Wigham dated July 26, 1954 (to which counsel withdrew all objections, R.

172) indicates that Price did see Grant shortly before July 26, 1954. It corroborates Price's testimony that he did show Exhibit D, the letter of July 20, 1954, to Mr. Grant. That was after Price had received it from Mr. Wigham and before he returned it to the Monterey District Office. The proper fact, and the only one, is that he did show it to Grant. Appellee admits (her Brief 5, Footnote 2) that this letter of July 20, 1954, would put Grant on notice that Appellant "did not intend insurance coverage to be effective as soon as the premium was paid."

Appellee again refers to this matter on page 12 of her Brief wherein she says, Price "testified on direct that he showed Exhibit D to Peter Grant; but cross-examination established that he could not conceivably have done so as he did not see the Grants during the approximately 10 days when that letter was in his possession." Here again that statement of Appellee is misleading if it is intended to mean that Price did not see Grant. Whose "cross-examination" is referred to is not clear; but, if Appellee means Price's cross-examination, there is nothing in that cross-examination to the effect that he did not see Mr. Grant during the approximately 10 days. Nowhere does Mrs. Grant testify that Price did not see or have a conversation with Mr. Grant during that period of time. Therefore, Price's testimony that he did show the letter of July 20, 1954, to Mr. Grant stands uncontradicted and undisputed. The most that can be said by Appellee is that she was not there when Mr. Price showed Mr. Grant the letter.

E. THERE IS NOTHING UNCONSCIONABLE OR DISHONEST
ABOUT THIS TRANSACTION.

Appellee makes a considerable point of "unconscionableness" and "dishonest dealing" by citing cases and arguing the point.

Gaunt v. John Hancock Mutual Life, 160 F. 2d 599 is not in point here because there the completed application was received and approved. See *Corn v. United American Life Ins. Co.*, 104 F. Supp. 612 where the *Gaunt* case is distinguished. Neither *Ransom v. Penn Mutual*, nor any case cited therein, held a contract of insurance existed without at least a medical examination, where one was required.

In the instant case the application and receipt provide that *if this* application (not just part A) is approved at the company's Home Office for the class, plan and amount of insurance herein applied for, *then* the insurance in accordance with the terms applied for shall be in force from the date hereof, and, of course, there is the printed and written matter about the "Appointment for Medical Examination."

The applicant gains a distinct advantage in that *if* the completed application is approved, the insurance company will pay even if the applicant dies between the date of the receipt and before the issuance and delivery of the policy.

Hyder v. Metropolitan (S.C.), 190 S.E. 239, 245.

There is nothing "unconscionable" or "dishonest" about the purchaser of life insurance paying for an advantage that he otherwise would not have.

CONCLUSION.

The Record shows that the Appellee herself introduced evidence not to vary the terms of the alleged contract but to explain them, and it fully explains that portion of the receipt about the medical examination to the effect that Grant knew he had to go to Dr. Blaisdell for a medical examination for this insurance. Appellee is bound by her own testimony. Mr. Grant also knew, because of Exhibit D, the letter of July 20, 1954, that the Appellant, at its head office in San Francisco, would have to view all the completed papers before they could act upon the application. This, of course, is clear by the language in part A of the application and the receipt.

The state of the evidence is such that this Court is not bound by the construction of the trial court, but can and should interpret Exhibits 1 and 2 and arrive at its own conclusion as to whether or not a contract of insurance was in existence at the date of Peter Grant's death.

There are no authorities cited in Appellee's Brief that require this Court to refrain from exercising its judicial mentality in placing its own interpretation upon the alleged contract of insurance. None of the cases cited in Appellee's Brief are authority for the proposition that this Honorable Court is bound by the interpretation of the trial court. The cases cited on page 31 of Brief of Appellee are not in point here. This Court is not enjoined from exercising its judicial reasoning in arriving at its own interpretation. Here the trial court found no ambiguity nor was there any

conflict of fact in the extrinsic evidence. Avowedly, Appellee's purpose in putting in such evidence was to explain and not to vary the writings.

It is respectfully submitted that the judgment should be reversed and judgment entered in favor of Appellant.

Dated, San Francisco, California,
April 1, 1959.

Respectfully submitted,

KNIGHT, BOLAND & RIORDAN,
BURTON L. WALSH,
JOHN J. QUIGLEY,
Attorneys for Appellant.

No. 16131 ✓

United States
Court of Appeals

for the Ninth Circuit

ARTHUR S. FLEMMING, Secretary of Health,
Education and Welfare of the United States,
Appellant,

vs.

HELMER F. LINDGREN, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILE

DEC 12 1958

PAUL P. O'BRIEN,



No. 16131

United States
Court of Appeals
for the Ninth Circuit

ARTHUR S. FLEMMING, Secretary of Health,
Education and Welfare of the United States,
Appellant,
vs.

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Transcript of Record

Appeal from the United States District Court
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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JACOB, JONES & BROWN,
EUGENE E. FELTZ,
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Portland 4, Oregon,

Attorneys for Appellee.

In The District Court of the United States
For The District of Oregon

Civil No. 9289

HELMER F. LINDGREN, Plaintiff,

vs.

MARION B. FOLSOM, Secretary of Health, Edu-
cation and Welfare of the United States,
Defendant.

COMPLAINT

Comes now the Plaintiff, and for cause of action
against the Defendant, complains and alleges as
follows:

I.

This is a civil action and arises under the laws
of the United States of America providing for so-
cial security, and jurisdiction of this cause rests
upon Title 42, United States Code, Section 405(g)
(Social Security Act Section 205(g)).

II.

That at all times herein mentioned Plaintiff was
and now is a resident of the State of Oregon.

III.

That the Defendant, Marion B. Folsom, is the
duly commissioned, qualified and acting Secretary
of Health, Education and Welfare.

IV.

That during all of the years 1953 and 1954, the Plaintiff was employed as an employee by Lindgren & Company, an Oregon corporation, and received wages from said company as follows: \$3,600.00 in 1953—\$2,925.00 in 1954. Lindgren & Company reported said wages to the District Director of Internal Revenue in Portland, Oregon and paid the Federal income taxes withheld and the social security contributions due thereon. The Plaintiff filed Federal income tax returns for the years 1953 and 1954 with the District Director of Internal Revenue in Portland, Oregon and reported the wages received from Lindgren & Company in the sums of \$3,600.00 and \$2,925.00, respectively, for the said years 1953 and 1954, and paid the income taxes due thereon.

V.

That the Plaintiff attained the age of 65 on March 31, 1954. On or about October 25, 1954 and January 4, 1955, the Plaintiff applied to the Department of Health, Education and Welfare, Social Security Administration, for old age insurance benefits. On or about October 30, 1956, the Department of Health, Education and Welfare, Social Security Administration, denied the Plaintiff's claim for old age insurance benefits.

VI.

On or about November 8, 1956, the Plaintiff filed a Protest with the Department of Health, Education and Welfare, Social Security Administration,

District Office, Portland, Oregon, requesting a hearing before a Referee of the Social Security Administration. On or about April 3, 1957, a hearing was held before Edward K. Adelsheim, Referee of the Social Security Administration. On or about April 8, 1957, the said Referee of the Social Security Administration entered his decision that the claimant was not entitled to old age insurance benefits.

VII.

On or about April 24, 1957, the Plaintiff filed a request for review of the Referee's decision with the Department of Health, Education and Welfare, Social Security Administration, Office of Appeals Council. On or about June 7, 1957, the Office of Appeals Council issued its order denying the request of the Plaintiff for review of the Referee's decision.

VIII.

The denial by the Department of Health, Education and Welfare, Social Security Administration, of the Plaintiff's claim for old age insurance benefits was based upon said Administration's determination that the Plaintiff was not paid "wages" in 1953 and 1954, other than the sum of \$744.84 in the first quarter of 1954, for the reason that the employing corporation did not earn sufficient income to warrant said "wages".

IX.

The determination by the Department of Health, Education and Welfare, Social Security Admin-

istration, that the Plaintiff did not receive wages during the years 1953 and 1954, other than the sum of \$744.85 in the first quarter of 1954, is erroneous for the following reasons:

(1) There is no substantial evidence to support the finding by the Department of Health, Education and Welfare, Social Security Administration, that the Plaintiff did not receive wages during 1953 and 1954 in the sums of \$3,600.00 and \$2,925.00, respectively.

(2) The Department of Health, Education and Welfare, Social Security Administration, erroneously applied the law to the facts surrounding the Plaintiff's employment by determining that the Plaintiff did not receive wages during the years 1953 and 1954 in the sums of \$3,600.00 and \$2,925.00, respectively, because the employing corporation did not show sufficient profits to support the payment of such wages to the Plaintiff.

Wherefore, Plaintiff demands judgment of this Court reversing the decision of the administrator and determining that the Plaintiff received wages under the Social Security Act during the years 1953 and 1954 in the sums of \$3,600.00 and \$2,925.00, respectively.

JACOB, JONES & BROWN,

/s/ By EUGENE E. FELTZ,

Of Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed July 23, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, by and through C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney, and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

1. Defendant admits the allegations in Paragraphs, I, II, III, VI and VII of the complaint.

2. Defendant denies the allegations in Paragraph IV of the complaint except that he admits that returns were filed in the name of Lindgren and Company with the Internal Revenue Service in Portland, Oregon, purporting to show payment of alleged wages to the plaintiff in the sum of \$3,600 in 1953 and \$2,925 in 1954, and paying purported Federal Insurance Contributions Act taxes on such alleged payment of wages. Defendant also admits that the plaintiff filed "income tax returns" for the years 1953 and 1954 and reported the receipt of the aforesaid alleged wages in the sums of \$3,600 and \$2,925, respectively, for the said years 1953 and 1954, and paid purported income taxes thereon.

3. Defendant admits the allegation in Paragraph V of the complaint, but further answering the allegation that plaintiff "on or about October 25, 1954, and January 4, 1955" applied for old-age insurance benefits, defendant states that an applica-

tion for such benefits, filed by the plaintiff on October 25, 1954, was withdrawn by the plaintiff, who filed a second application on January 4, 1955.

4. Defendant denies the allegations in Paragraph VIII of the complaint, except that he admits that the said Lindgren and Company only had a total net profit in 1953 and 1954 of \$744.84, which amount the referee found to be allocable to plaintiff's Social Security Account as "wages" for the first quarter of 1954.

5. Defendant denies the allegations in Paragraph IX of the complaint.

II.

The plaintiff has no claim upon which relief can be granted, as is shown by the provisions of the Social Security Act, as amended; the regulations of the Social Security Administration promulgated thereunder; the transcript of the record upon which the decision complained of was made; and the findings and conclusions of the Secretary of Health, Education and Welfare.

III.

The findings of fact of the Secretary of Health, Education and Welfare are supported by substantial evidence and are conclusive.

IV.

In accordance with the provisions of Section 205 (g) of the Social Security Act, as amended, 42 U.S.C.A. 405 (g), defendant files herein as part

of this answer a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements, and for judgment in accordance with Section 205 (g) of the Social Security Act, as amended, 42 U.S.C.A. 405 (g), affirming the decision complained of.

C. E. LUCKEY,
United States Attorney
for the District of Oregon,
/s/ EDWARD J. GEORGEFF,
Assistant United States Attorney.

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 31, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant above-named, by and through his attorneys of record, C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney, and moves the Court as follows:

To enter summary judgment for the defendant in accordance with the provisions of Rule 56 (b) of the Federal Rules of Civil Procedure, on the grounds that the pleadings and certified copy of the transcript of record of proceedings relating to the

claim of plaintiff before the Social Security Administration filed herein with the answer, pursuant to the provisions of 42 USC 405 (g), show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law, affirming the decision of the Social Security Administration.

In further support of this motion, there is attached hereto and filed herewith, defendant's memorandum brief.

C. E. LUCKEY,

United States Attorney,

District of Oregon,

/s/ EDWARD J. GEORGEFF,

Assistant United States Attorney,

Of Attorneys for Defendant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed December 27, 1957.

[Title of District Court and Cause.]

OPINION

Before: Honorable William G. East, U. S. District Judge.

U. S. Courthouse, Portland, Oregon, May 5, 1958—10:00 a.m.

The Court: The Court has heard the arguments of the plaintiff and has heard the statement of counsel for the defendant that the defendant relies

upon the record as it now is presented. I have had an opportunity to review the record and I am of the firm opinion, as found by the referee, that there was no fraudulent intent or deceitful purpose on the part of the petitioner in forming his corporation with the view of tending to qualify for old age assistance. I see nothing different in this tightly-owned private corporation as to the management of an individual business than any of the thousand others in the United States.

Now, the defendant has taken the position that by reason of the fact that the corporation paid the plaintiff a salary and sustained a net operating loss of \$1644.17, being the year 1953, and the sum of \$45.99 in 1954, this employee or officer of the privately-owned corporation would not be entitled to the benefit.

Now, I can well imagine the act of an individual who was incorporated himself and then from his own funds put in \$25,000 in the corporation and then paid himself back \$25,000 salary for some tax purpose would indicate a deceitful or fraudulent intent. But, as I stated, this record is absolutely devoid of any fraud or deceit on the part of this plaintiff; in fact, he acted only on the advice of advisors.

So, it seems to me that in view of the fact that the corporation is solvent capital-wise as it holds these certificates which it has retained for income tax purposes, and they are more than sufficient to repay any loan that the plaintiff may have made

to the corporation, that it falls completely within the ruling of *MacPherson versus Ewing*, 107 Federal Supplement, 666. And, I can find no other finding as far as the matter of law is concerned except to quote that case and say: "Upon the record, therefore, the decision of the Administrator must be considered, in law, to be arbitrary and capricious." The motion for summary judgment on behalf of the defendant is denied. Plaintiff may have an order referring this matter back to the Administrator for appropriate proceedings.

Certified A True and Accurate Transcript:

/s/ JACK ELLIS,

Official Court Reporter.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT AND DI-
RECTING JUDGMENT FOR PLAINTIFF

This matter having come on before the Court upon the motion of the defendant for a summary judgment for the defendant, and the defendant having appeared by and through his attorneys of record, C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney, and the plaintiff having appeared by and through his attorneys, Jacob, Jones & Brown and Eugene E. Feltz, and the respective parties having submitted briefs in sup-

port of their respective positions, and the Court having fully examined the pleadings and the transcript of the record filed by the defendant; and

It appearing to the Court that the decision of the defendant, denying the claim of the plaintiff for social security benefits, was based upon an erroneous application of the law to the facts of the case and must be considered, in law, to be arbitrary and capricious;

Now, Therefore, It Is Hereby Ordered that the motion of the defendant for a summary judgment be and the same is hereby denied; and

It Is Further Ordered that the judgment be entered for the plaintiff on his complaint herein.

Dated this 9th day of June, 1958.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed June 9, 1958.

In The United States District Court
For The District of Oregon

Civil 9289

HELMER F. LINDGREN, Plaintiff,

vs.

MARION B. FOLSOM, Secretary of Health, Edu-
cation, and Welfare, Defendant.

JUDGMENT

This matter having come on before the Court upon the motion of the defendant for a summary judgment, and the defendant having appeared by and through his attorneys of record, C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney, and the plaintiff having appeared by and through his attorneys, Jacob, Jones & Brown and Eugene E. Feltz, and the respective parties having submitted briefs in support of their respective positions, and the Court having fully examined the pleadings and the transcript of the record filed by the defendant; and

It appearing to the Court that the decision of the defendant denying the claim of the plaintiff for social security benefits was based upon an erroneous application of the law to the facts of the case and must be considered, in law, to be arbitrary and capricious, and it further appearing that

the record on file contains no evidence whatsoever of any fraud or deceit on the part of the plaintiff in his claim for old-age insurance benefits; and

It further appearing to the Court that plaintiff received wages subject to the Social Security Act during the years 1953 and 1954 in the sums of \$3,600.00 and \$2,925.00 respectively, and is entitled to old-age insurance benefits based thereon;

Now, Therefore, It Is Hereby Ordered and Decreed that the decision of the defendant denying the plaintiff's claim for old-age insurance benefits, based upon wages of \$3,600.00 and \$2,925.00 earned in 1953 and 1954, respectively, be and the same is hereby reversed; and

It Is Further Ordered and Decreed that this cause be, and the same is, hereby remanded to the defendant for administrative action allowing the claim of the plaintiff for old-age insurance benefits based upon wages earned during the years 1953 and 1954 of \$3,600.00 and \$2,925.00 respectively.

Dated this 9th day of June, 1958.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed June 9, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Helmer F. Lindgren, Plaintiff, and Jacob, Jones & Brown and Eugene E. Feltz, Attorneys for Plaintiff:

Notice is hereby given that Marion B. Folsom, Secretary of Health, Education, and Welfare, defendant above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered May 5, 1958 denying the defendant's motion for summary judgment and from the order denying defendant's motion for summary judgment and directing judgment for the plaintiff entered June 9, 1958, and from the judgment filed and entered in favor of the plaintiff and remanding to the defendant for administrative action allowing the claim for old-age insurance benefits based upon wages earned during 1953 and 1954 of \$3600.00 and \$2,925.00 respectively, entered on June 9, 1958.

Dated this 2nd day of July, 1958, at Portland, Oregon.

/s/ C. E. LUCKEY,

United States Attorney For the District of Oregon,
Of Attorneys for Defendant.

[Endorsed]: Filed July 2, 1958.

[Title of District Court and Cause.]

DOCKET ENTRIES

1957

July 23—Filed complaint.

July 23—Issued summons—to marshal.

Aug. 21—Filed summons—with Marsal's returns.

Sept. 20—Filed Stipulation for extension of time
for defendant to answer.

Sept. 20—Filed and entered Order allowing extension of time for defendant to answer to
and including October 31, 1957.

Oct. 31—Filed Answer.

Dec. 27—Filed deft's Motion for summary judgment and Memorandum Brief in Support thereof.

1958

Feb. 3—Record of hearing upon Motion for Summary Judgment; submitted.

Feb. 3—Entered Order allowing pltf sixty days from date hereof within which to file brief.

Apr. 3—Entered Order extending time for plaintiff to file brief to and including May 5, 1958.

Apr. 30—Filed Supplemental Brief of United States in Support of Motion for summary judgment.

May 5—Entered Order that defendant's motion for summary judgment be denied;
Entered Order that pltf submit appropriate order referring matter to Administrator.

1958

- June 9—Filed and Entered Order denying defendant's Motion for summary judgment and directing judgment for plaintiff.
- June 9—Filed and Entered Judgment in favor of plaintiff and remanding to defendant for administrative action allowing claim for old-age insurance benefits based upon wages earned during years 1953 and 1954 of \$3,600.00 and \$2,925.00 respectively.
- July 2—Filed Notice of Appeal by defendant (Copy mailed to Jacob, Jones & Brown).
- Aug. 6—Filed Designation of contents of record on appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Motion for summary judgment; Order denying defendant's motion for summary judgment and directing judgment for plaintiff; Judgment; Notice of appeal; Designation of contents of record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9289, in which Marion B. Folsom,

Secretary of Health, Education and Welfare of the United States is the defendant and appellant and Helmer F. Lindgren is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 7th day of August, 1958.

[Seal] R. DeMOTT,
 Clerk,
 /s/ By THORA LUND,
 Deputy.

In The United States District Court
For The District of Oregon

Civil Action No. 9289

HELMER F. LINDGREN, Plaintiff,

vs.

MARION B. FOLSOM, Secretary of Health, Edu-
cation, and Welfare, Defendant.

TRANSCRIPT OF PROCEEDINGS

Certification

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Department of Health, Education, and Welfare, under authority

conferred upon me by the Secretary, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Helmer F. Lindgren for old-age insurance benefits under Title II of the Social Security Act, as amended, such transcript including application for benefits, testimony and other evidence upon which the decision of the referee of the Appeals Council, Social Security Administration, was based.

Dated: October 2, 1957.

[Seal] /s/ JOSEPH E. McELVAIN,
Chairman, Appeals Council, Social Security Administration, Department of Health, Education and Welfare.

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Department of Health, Education, and Welfare,
Social Security Administration, Office of Appeals Council.

REFEREE'S DECISION

In the case of Helmer F. Lindgren (Claimant).
Case No. PO-445. Claim for Old-Age Insurance Benefits. Helmer F. Lindgren (Wage Earner).
544-34-6929 (Social Security Acct. No.).

This case is before the referee upon a request for hearing filed on November 10, 1956 by Helmer F. Lindgren, the claimant. He appeals from a determination by the Bureau of Old-Age and Survivors Insurance of the Social Security Administration disallowing his application for old-age insurance

benefits. A hearing at which the claimant appeared personally and by his attorneys, Garthe Brown and Eugene E. Feltz, was held on April 3, 1957 at Portland, Oregon.

The claimant, who attained age 65 on March 31, 1954, filed application for old-age insurance benefits on October 25, 1954. He withdrew this application and filed a second application on January 4, 1955. Both applications were based upon claimant's employment for Lindgren and Company of Portland beginning January 1953. The Bureau determined that an insured status could not be established on the basis of remuneration reported for the claimant for social security tax purposes by Lindgren and Company, and claimant was notified by letter dated October 30, 1956 of the disallowance of his application on the ground that he had only one of the six quarters of coverage necessary in his case for a fully insured status. Without asking for reconsideration, claimant requested a hearing.

The issue before the referee is whether the claimant is a fully insured individual and entitled to old-age insurance benefits under provisions of the Social Security Act. This depends upon whether remuneration reported by Lindgren and Company as paid to the claimant in 1953 and 1954 is creditable to his social security account as "wages," under section 209 of the Act.

Section 202(a) of the Social Security Act, as pertinent hereto, provides for the payment of old-age insurance benefits to every individual who is a fully insured individual, and section 214(a)(2)(A)

of the Act defines a fully insured individual to mean one who has at least six quarters of coverage. A quarter of coverage under section 213(a)(2)(B) of the Act means a calendar quarter in which the individual has been paid wages of at least \$50. The pertinent part of section 209(g) defines "wages" as remuneration paid after 1950 for employment. It is unquestioned here that as an officer of Lindgren and Company, commencing in February 1953, the claimant was in an employment relationship, within the meaning of section 210 of the Social Security Act, and, specifically, section 210 (k) (1).

In his application for benefits the claimant stated that he was an employee of Lindgren and Company from January 1953 and was still working. It is shown that remuneration to the claimant was reported as wages, as follows: \$900 per quarter in all four quarters of 1953 and the first three quarters of 1954 and \$225 in the fourth quarter of 1954.

As of December 7, 1954, according to Oregon State Corporation Department, Lindgren and Company was an Oregon corporation in good standing. It came into existence February 2, 1953 by changing its name from Snow-Williams Motors, Inc., which former corporation had been organized March 3, 1952. The registered agent for Lindgren and Company was the claimant, and the purpose of the corporation was livestock breeding, raising fryers, and farming. The claimant had reported self-employment income of \$1,428.46 for 1951. Investigation in the last quarter of 1952 disclosed that the nature of claimant's business was raising fryers on

a three-acre tract on the edge of Portland. The claimant indicated he and his wife spent 90 per cent of their time raising fryers and 10 per cent in retailing. A determination was made that claimant's income from this business was excluded from net earnings from self-employment, and he was so informed sometime in about December 1952. Because of this information he consulted his attorneys about arrangements necessary to obtain social security coverage. Thereupon Lindgren and Company was organized for the primary purpose of obtaining social security coverage for the claimant. The directors of Snow-Williams Motors, Inc., are not related to or known to the claimant. The reason for taking over the articles of incorporation of Snow-Williams Motors, Inc., was one of economy. There is of record a certificate of filing supplemental articles of incorporation showing the change in capitalization of the Snow-Williams Motors, Inc., the change of name to Lindgren and Company, and the change of business from the automobile business to farming and poultry. There is also a copy of a bill of sale dated February 13, 1953 showing that for consideration of \$10, the claimant transferred to Lindgren and Company twenty-two hundred head of chickens valued at \$1,400, six head of cattle valued at \$600, seven brooders valued at \$200, and four incubators valued at \$300. Thus, the initial assets of the corporation totalled \$2,500, represented by 25 shares of stock at \$100 each. Originally the claimant and his wife owned 24 shares, one share being owned by Shirley W. Barker, claimant's stepson, who was a

director and the vice-president of the corporation. By Oregon statute enacted in 1953, it no longer was necessary for all directors of a corporation to be stockholders, and it is alleged that subsequently Mr. Barker endorsed his one share of stock over to the claimant and his wife.

In a statement dated April 9, 1956, Mr. Barker declared: "Lindgren and Company has operated at all times on a cash basis. Original cash on hand from sale of capital stock (\$2500) plus receipts from sales has been sufficient to meet its obligations." It is shown that Mr. Barker was in error in stating the corporation originally acquired a cash asset from the sale of capital stock.

The claimant has been president of the corporation since its inception, and his wife has been secretary and treasurer. Although apparently up to 1953 she spent as much time working in the business as did the claimant, it is alleged that from February, 1953 on she devoted decreasing amounts of her time in services for the corporation; her work was mainly bookkeeping, in which the claimant assisted. The claimant's wife has received no remuneration for her services to the corporation.

At a meeting of the Board of Directors on February 13, 1953, the salary of the claimant as president of the corporation was set at \$300 a month, beginning with January 1953; this amount times 12 was the exact maximum creditable annually for social security purposes. On September 22, 1954, at a directors' meeting, a resolution was passed reducing the president's salary to \$75 a month. The stated

reason was that business was poor and the corporation was running behind every month. It is noted that under section 203(b)(1) of the Social Security Act in effect in October 1954, a beneficiary under age 75 was not entitled to a benefit for any month in which he rendered services for wages of more than \$75. The claimant first applied for benefits in October 1954. As of April 1955, the Board of Directors raised the president's salary to \$100 a month. It is not shown that this increase was occasioned by any improvement in the company's business or financial position. Again, it is noted that under 1954 Amendments of the Social Security Act effective in January 1955 a beneficiary may have \$1,200 in earnings in any 12-month taxable year without incurring loss of benefits.

The evidence clearly demonstrates that the business of the corporation was conducted in the same manner after incorporation as the claimant had conducted it before, as a sole proprietorship.

Oregon corporation excise tax returns for 1953 and 1954 showed the following income and expenses:

	Income	
	1953	1954
Fryer sales	\$ 8,344.40	\$7,950.68
Meat sales	327.56	643.09
Egg sales	330.10	8.53
Sack sales	145.36	158.72
Feed rebate	556.75	675.57
Interest	27.50	43.50
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Total receipts	\$ 9,731.67	\$9,480.09

Expenses		
	1953	1954
Feed	\$ 6,877.73	\$6,126.74
Compensation of officers	3,600.00	2,925.00
Depreciation	20.00	20.00
Taxes:		
Social security	54.00	58.50
Corporation	10.00	10.00
Briquets	144.70	22.40
Chickens	86.00	16.00
Hay	265.00	175.68
Electricity	163.35	122.76
Calves	52.00	39.00
Legal and accounting....	103.06	—
	<hr/>	<hr/>
Total	\$11,375.84	\$9,516.08

The State tax returns show the corporation suffered a loss of \$1,644.17 in 1953 and \$35.99 in 1954. Federal corporation income tax returns, copies of which are of record, are in exact agreement with the State return for 1953 and in substantial agreement with the State return for 1954.*

For the corporation to meet its obligations, including the claimant's salary, it was necessary for it to borrow money. There are of record copies of four demand notes which indicate the corporation's promise to pay to the wage earner on demand the value of the note. These notes are dated February 13, 1953, for \$800; May 22, 1953, for \$500; Novem-

* The Federal tax return for 1954 shows a loss of \$45.99; an additional deduction of \$10 is shown.

ber 18, 1953, for \$600; and July 1, 1954, for \$1,000. Across the face of the note for \$800 dated February 13, 1953 is a notation by the claimant to the effect that \$600 was paid on December 31, 1955. There is no showing in the corporation's tax return for 1955 of payment on this note. All the notes are signed by the wage earner and his wife, but do not show the corporate seal or corporate signature of the corporation. It is not shown by corporate minutes that the claimant and his wife were authorized to negotiate loans on behalf of the corporation.

The claimant allegedly received his salary at the end of each quarter. Copies of salary checks in file show that social security tax and State tax (except one) were deducted; six checks show a deduction for Federal withholding tax. Twelve checks were received, one for each quarter of 1953, 1954, and 1955. The checks are drawn on the First National Bank of Portland, and the bank states that the cancellation perforations are genuine. A bank official was unable to state whether the checks were merely cashed or deposited to some account. One of the checks, that for September 30, 1954, bears the endorsement "Deposited to the credit of Lindgren & Co.," which would indicate that it was cashed by the company or deposited to the company's checking account. The claimant had personal savings accounts, but no checking account. By way of explanation the claimant stated on May 10, 1956 that as president of Lindgren and Company, he made cash sales of chickens, eggs, etc., and from these cash sales he took certain amounts as advances on his

wages. At the end of each quarter, a check was issued to him by the corporation for the full amount of his salary, less withholding taxes and social security deductions. He would then use part of his check to reimburse the company for the amount of advances on his wages made during the quarter for which the wages were paid. This was done by depositing parts of the checks he received as wages in the company's bank account. This was the reason the cancelled check dated September 30, 1954 was deposited to the credit of Lindgren and Company. He stated that there is no confusion of funds of the corporation with his own personal funds. The referee has examined all checks and monthly statements in 1953 and 1954 of the company's checking account. It appears that this account was used exclusively for company business.

The record shows that the business of the corporation was conducted on a farm owned by the claimant and his wife, title to which was never transferred to the corporation. The tax returns for 1953 and 1954 do not show any expense for rent. The 1955 Federal corporation income tax return shows an expense for rent of \$600. According to a Report of Contact dated October 19, 1955, the claimant stated that he did not charge the corporation any rental for use of the farm. In a statement dated April 9, 1956, William Barker alleged that 1955 was the first year in which the corporation had shown sufficient profit to pay rent on the farm property used for the business. No rental was paid for the property for 1953 or 1954. Garthe Brown,

one of the claimant's attorneys, in a Report of Contact dated May 4, 1956, is shown to have stated that \$50 a month was considered a fair rental for the farm of the wage earner through the entire period, but was not paid in 1953 and 1954 because of lack of funds. He stated that the \$1,200 rent for 1953 and 1954 is still an outstanding obligation of the corporation.

Upon careful consideration of all the evidence of record, the referee finds that except for \$744.84, which is allocable to the first quarter of 1954, the claimant was not paid "wages" in 1953 and 1954 by Lindgren and Company, within the meaning of section 209 (g) of the Social Security Act. The corporation's tax returns for 1953 and 1954 reflected neither the personal loans made by the claimant to the corporation nor the rent of \$50 per month which the corporation was to pay for the use of the claimant's property. Except for \$744.84, the remuneration reported for the claimant for social security purposes represents repayment of funds which the claimant advanced to the corporation. After the repayment of such advances, the corporation did not show sufficient profit to support a finding by the referee that the alleged remuneration constituted "wages." The amount of \$744.84 represents the net profit for 1953 and 1954, after eliminating the expense of the claimant's salary for the two years and deducting rent and the money loaned by him to the corporation during these two years. Following is a fair reconstruction of the company's financial status:

	1953	1954
Expense including salary	\$11,375.84	\$9,516.08
Less salary	3,600.00	2,925.00
Expense without salary .	7,775.84	6,591.08
Income	9,731.67	9,480.09
Less expense without salary	7,775.84	6,591.08
Net profit before deducting loans and rent	1,955.83	2,889.01
Less loans by claimant .	1,900.00	1,000.00
	55.83	1,889.01
Less rent	600.00	600.00
Net profit without salary(Loss)	544.17	1,289.01
Net loss in 1953		544.17
Net profit for 1953 and 1954 available for salary		744.84

Where an employee exercises control over a corporation because of stock ownership and his power as a director or officer, transactions between him and the corporate entity require very close scrutiny to distinguish between "wages," on the one hand, and dividends or distribution of corporate assets on the other. Here, the claimant, who was the president and stockholder of a corporation whose stock was owned exclusively by himself and his wife, ad-

vanced money to it when necessary and withdrew funds from the corporation at irregular intervals and in irregular amounts as funds were available and in accordance with his personal needs. The referee has noted above that initially the claimant's salary was set at the exact maximum creditable for social security purposes, and that subsequently changes in salary were made for no apparent reason except to permit continuous benefit payments without deductions because of wages or earnings in excess of the statutorily-permitted amounts. Although the referee assumes good faith on the part of the claimant, he regards the case of *Gancher v. Hobby*, 145 F. Supp. 461 (D. Conn. 1955) as of precedent value in the disposition of the instant claim.

It is the further finding of the referee that the claimant, being credited with only one quarter of coverage, does not have the status of a fully insured individual under the applicable provisions of the Social Security Act.

It is the decision of the referee that the claimant is not entitled to old-age insurance benefits based upon his application of January 4, 1955.

Dated: April 8, 1957.

/s/ EDWARD K. ADELSHEIM,
Referee.

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Department of Health, Education and Welfare.
Case No. PO-445.

Hearing held at Portland, Oregon on April 3, 1957.

Referee: Edward K. Adelsheim.

Referee: I would like to state what I consider to be the issue to see if you understand what will be before me for written decision as I understand it. The general issue is whether Mr. Lindgren is a fully insured individual and entitled to old-age insurance benefits for which he made application. This would be under applicable provisions of the social security law. Specifically, this will depend upon, the general issue will turn on, depend upon, whether remuneration reported by Lindgren and Company, commencing January, 1953, should be credited to his social security account as wages, under section 209 of the Social Security Act. Is that as you understand what the decision before me will be?

Mr. Feltz: Yes.

Mr. Brown: Yes. [26]

* * * * *

Testimony

HELMER F. LINDGREN

claimant, and Garthe Brown and Eugene E. Feltz, attorney-representatives, being first duly sworn, testified as follows:

Examination By Referee:

Referee: I'll start with Mr. Lindgren. First of all, I want to make sure I have your address correctly. Is it 7921 Southeast King Road, Portland 22?

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Helmer F. Lindgren.)

Claimant: Yes, sir.

Referee: The first thing I want to do, Mr. Lindgren, is to clear up Mr. Barker's status. I understand he was a vice president and a director of the corporation. Is that correct?

Claimant: Yes, sir.

Referee: Was he also a stockholder?

Claimant: Yes, sir.

Referee: Are you sure?

(No answer.)

Referee: Are you sure?

Claimant: Well, yes.

Referee: How many shares of stock did he own?

Claimant: One.

Referee: How many shares of stock did you own?

Claimant: Twenty-four.

Referee: How many did your wife own? [28]

Claimant: Well, we had the 24 together.

Referee: You and your wife owned them together?

Claimant: Yes.

Referee: After you learned, toward the end of 1952, that your being self-employed raising chickens didn't count for social security purposes, did you consult attorneys to see what you could do about it?

Claimant: Yes.

Referee: You went to Mr. Brown and Mr. Feltz

(Testimony of Helmer F. Lindgren.)

to see what you could do about getting covered for social security?

Claimant: Yes.

Referee: Is that why the corporation was formed?

Claimant: Yes.

Referee: As I understand it, you and Mrs. Lindgren both worked full time raising the chickens and eggs, and retailing them. Is that correct?

Claimant: Retailed some; we wholesaled most of them.

Referee: Wholesaled some, too; is that right?

Claimant: Yes.

Referee: Did you and your wife each put in about the same amount of time raising and selling the chickens?

Claimant: I did the raising and selling.

Referee: I'm looking at Exhibit 4. This was on December 18, 1952. There was an interview with you, in the course of which you indicated that approximately 90 per cent of your time and your wife's time was spent at raising the fryers, and 10 per cent in retailing. Is that correct, or not?

Claimant: Well, I don't recall that.

Mr. Feltz: Perhaps you could show him this exhibit and when he sees his handwriting he could tell.

Referee: It isn't his handwriting. It's a write-up of an interview——

(Mr. Feltz shows Exhibit 4 to claimant.)

(Testimony of Helmer F. Lindgren.)

Mr. Feltz: Mr. Lindgren hasn't signed or written it. I don't see how he could testify to it.

Referee: I didn't say anything about testifying to it. I said he indicated at that time that this was the distribution of time. I'm asking, is that correct? Did your wife work about the same amount of time you did?

Claimant: Not in the raising of poultry.

Referee: What was her work?

Claimant: She was a housewife.

Referee: In 1953 and 1954 and 1955, did she work in connection with the raising of the fryers, did she do any work?

Claimant: Nothing. No.

Referee: Nothing whatsoever?

Claimant: No. Not in the raising of them.

Referee: Did she do any of the selling?

Claimant: Well, sometimes, retail, but not much; some, she did.

Referee: Did she keep the records for the company?

Claimant: I—well—she—— [30]

Referee: Did you do that too?

Claimant: We both——

Referee: You both did?

Claimant: Yes.

Referee: How much of your time, would you say, was spent in connection with the business from 1953 on, and how much of your wife's?

Claimant: All of my time.

(Testimony of Helmer F. Lindgren.)

Referee: And how much of her time, would you say?

Claimant: I don't know what I'd say to that.

Referee: You have no idea?

Claimant: Well, just a small part.

Referee: Can you give me any idea what you have in mind?

Mr. Feltz: He's asking you in percentage.

Claimant: Maybe 10 per cent.

Referee: Only 10 per cent of her time was spent that way?

Claimant: Something like that, maybe.

Referee: Did she have anything to do with the feeding of the fryers?

Claimant: No.

Referee: Did she ever go out to the place where they were raised on your property?

Claimant: Oh, sure, sometimes she went out.

Referee: For what purpose did she go there?

Claimant: Well, just like anybody else would go out to see.

Referee: I'm curious as to why you told a representative [31] of the Portland social security office in 1952 that you and your wife spent about an equal amount of time in connection with the raising and retailing. That does not seem to be your statement now. Was the situation different in 1952 than——

Claimant: Well, she——

Referee: Let me ask the question. Was the sit-

(Testimony of Helmer F. Lindgren.)

uation, so far as time spent by your wife, different in 1952 than it was from 1952 on?

Claimant: Yes, she helped me more then than she did later.

Referee: Why?

Claimant: She was getting older, then, like the rest of us.

Referee: You mean to say her time went from 100 per cent down to 10 per cent?

Mr. Feltz: I object. There's a statement in that file which you have put in as evidence, signed by one of the representatives of the Social Security Administration, not signed by Mr. Lindgren. There is nothing in there which states that Mr. Lindgren signed or said that. I don't see why you keep on insisting on making him state she did put in 100 per cent of her time, when he didn't say she did.

Referee: There is a presumption in regard to the validity and accuracy of the reports made in the ordinary course of business conducted by public officials. That would explain——

Mr. Feltz: It would be to the correctness of the form, but not what is in the form.

Referee: There would be a presumption of the accuracy [32] and correctness of the write-up which the representative of the Social Security Administration gave in December, 1952, Exhibit 4.

Mr. Feltz: That presumption is not sustained by Mr. Lindgren. He has refuted that presumption and the presumption falls at that time. He said she did not put in more than 10 per cent. If you

(Testimony of Helmer F. Lindgren.)

had some other evidence that he said something different at that time, we would be glad to hear it.

Referee: I'll overrule your objection. I think the line of the questioning is relevant and, specifically, the last question. Was there a gradual decline, Mr. Lindgren, in the amount of work your wife did from 1952 on in connection with the raising and selling of fryers?

Claimant: Well, sure, she been working every year on it before 1953. In 1952 she used to help me all the time when we were raising poultry and turkeys. You are referring to that when I was denied that first time?

Referee: This was when you were denied in December, 1952. Why was it that when the corporation was formed Mrs. Lindgren received no remuneration for her work and you received it all?

Claimant: Well, that—she wasn't supposed to help with the poultry.

Referee: Why wasn't she?

Claimant: Isn't a wife supposed to be in the house taking care of the house?

Referee: You mean she helped with the poultry up to the time the corporation was formed, but not afterward? [33]

Claimant: She didn't help much before, either.

Referee: You said she did a lot through 1952.

Claimant: When we were raising turkeys before—that was in 1942, that was when she helped a lot.

Referee: Why is a wife supposed to help raise turkeys but not chickens?

(Testimony of Helmer F. Lindgren.)

Claimant: I don't know that. That was mostly up to her.

Referee: At the time that the corporation was organized in February, 1953, what cash was available to the corporation as operating capital, do you remember?

Claimant: Eight hundred dollars.

Referee: Eight hundred dollars?

Claimant: Yes.

Referee: That was money which you loaned?

Claimant: Yes.

Referee: Did you actually take that out of your bank account and deposit it to the corporation's account?

Claimant: Yes, sir.

Referee: You did?

Claimant: Yes, sir.

Referee: When you made other loans to the corporation in 1953 and in July, 1954, did you actually take funds out of your savings account and——

Claimant: No, sir.

Referee: You only took funds out of your account once? [34]

Claimant: Yes, sir.

Referee: In February 1953?

Claimant: Yes, sir.

Referee: The other loans which are represented by Exhibits 25, 26, and 27, those were the notes in July, 1954, May, 1953, and November, 1953, those three transactions didn't involve any transfer of

(Testimony of Helmer F. Lindgren.)

cash from your bank account to the corporation.
Is that correct?

Claimant: No, sir.

Referee: But you did withdraw \$800 from your savings account in February, 1953 and put it into the corporation's checking account. Is that right?

Claimant: Yes, sir.

Referee: When was the corporation's checking account started? Do you remember?

Claimant: Well, I can't say the date.

Referee: About the time that the corporation was formed you opened a checking account for the corporation?

Claimant: Yes, sir.

Referee: About February, 1953.

(Nodded affirmatively.)

Referee: Is your answer "Yes"?

Claimant: Yes, sir.

Referee: Was anything paid by any of the stockholders for the stock which was received in 1953 when the corporation was formed; was any cash paid to the corporation for its stock?

Claimant: No, sir. [35]

Referee: In Exhibit 19, which your step-son signed, he states: "Lindgren and Company has operated at all times on a cash basis. Original cash on hand from the sale of capital stock (\$2,500) plus receipts from sales has been sufficient to meet its obligations." That's wrong, isn't it? So far as "Original cash on hand from sale of capital stock plus receipts from sales has been sufficient

(Testimony of Helmer F. Lindgren.)

to meet its obligations''; that's an incorrect statement, isn't it?

Claimant: I don't understand.

Mr. Brown: I——

Referee: Do you wish to testify, Mr. Brown?

Mr. Brown: I think Mr. Barker is mistaken on that. The assets turned in for stock are shown on the bill of sale, are listed——

Referee: But no cash on hand from the sale of capital stock?

Mr. Feltz: Well, he, he——

Referee: One at a time, please, so we don't miss anything.

Mr. Brown: The cash was loaned to the corporation by Mr. Lindgren and the other assets, the ones listed, were turned in for exchange for stock.

Mr. Feltz: I wasn't around when he made that statement, but the fact that the cash on hand was from the fryers, the major item turned over was fryers, which were immediately turned into cash, sold in the ordinary course of business, that would——

Referee: The statement I referred to in Exhibit 19 reads this way: "Lindgren and Company has operated at all times on a cash [36] basis. Original cash on hand from the sale of capital stock (\$2,500) plus receipts from sales has been sufficient to meet its obligations."

Mr. Feltz: According to our information, that would be wrong.

Mr. Brown: That's wrong.

(Testimony of Helmer F. Lindgren.)

Referee: Have any of the stockholders ever paid anything in cash to the corporation for the stock, Mr. Lindgren?

Claimant: No.

Referee: Are you sure?

(No answer.)

Referee: So far as you know, that is true; is that correct?

Claimant: That's true.

Referee: Let me ask you a question, Mr. Brown.

Mr. Brown: Yes.

Referee: Exhibit 23 is the report of an interview with you. It reads in part: "Mr. Brown also stated that it is his memory"—this is the introduction to a question—"that the capital stock issued by the corporation is 50 shares at \$50 a share, 49 of which were owned by Mr. and Mrs. Lindgren and one share by Shirley Barker, vice president and stepson of the wage earner. The money for these shares of stock was not all paid into the company at one time, but only piece-meal as needed for operating expenses." How about that?

Mr. Brown: I think the agent has misconstrued or misunderstood what I told him. What I did was to tell him, in referring to the file, that the inventories were contributed to the corporation to provide money by which the corporation operated, plus loans which Mr. Lindgren made them.

Referee: Which were only made—one cash loan?

Mr. Brown: These other loans are represented

(Testimony of Helmer F. Lindgren.)

by notes, which [37] are evidence of cash he contributed to the company and replaced by a note.

Referee: He didn't actually transfer cash to the corporation's account.

Mr. Feltz: I object to that. In the file you asked him the question did he ever take money from any other bank account and put it into another bank account, but you didn't ask whether he took money and put it into the corporation.

Referee: I'll ask him. The three notes that followed the first note, what, if any, was the cash transaction involved?

Claimant: Well, that's what I received—wages from the company.

Referee: And you put it back in? You actually put it into the company's bank account?

Claimant: Yes, sir.

Referee: When the corporation lost money in 1953, did you have to draw on your savings account for living expenses?

(Reply not understandable.)

Referee: What?

Claimant: No. I probably drew some. I don't recall exactly.

Referee: If it is a fact that your savings account has been reduced steadily starting with 1953, would those reductions have gone for the living expenses of yourself and your wife, if that had happened?

Claimant: Yes, but the certificates——

Referee: What?

(Testimony of Helmer F. Lindgren.)

Claimant: I have been getting certificates every year from [38] the Co-op, prior to the corporation, that have come from the poultry Co-op.

Referee: This is income on which you live, at least in part, certificates from a Co-op.

Claimant: Yes.

Referee: Do you know why \$300 per month was reported as your wages in 1953, including January, 1953, when the corporation didn't start until February? Do you know why that was?

Claimant: Well, I turned into the corporation everything, all the business I had been doing that year.

Referee: What are the property taxes on the property used where the chickens are grown? Do you know?

Claimant: Around \$230.

Referee: When was it decided for the first time that the corporation should pay \$50 a month rent for the use of the property; do you know?

Claimant: I don't know.

Referee: Do you remember when it was first discussed?

Claimant: No, I don't.

Referee: Was rent discussed for the first time only after your social security application was turned down?

(No answer.)

Referee: Do you know?

Mr. Feltz: When was it turned down? Will you refresh my memory? [39]

(Testimony of Helmer F. Lindgren.)

Referee: It was turned down finally in October, 1956.

Claimant: It was before that.

Referee: What is that?

Claimant: The rent was paid before that.

Referee: When was rent paid?

Claimant: In 1955.

Referee: Why was it decided to pay rent in 1955 and not in 1954 and 1953?

Claimant: Can Mr. Brown answer that question?

Referee: I'm asking you.

Mr. Feltz: He's just asking whether you know. If you don't, just say so.

Claimant: I don't know.

Referee: Did your attorneys tell you you should state that the company paid rent in 1955, even though you hadn't so stated in 1954 or 1953?

Claimant: I don't recall.

Referee: You don't know.

Claimant: No.

Referee: Do you know how the rental value of \$50 per month was established, why it was set at \$50?

Claimant: Mr. Brown set that.

Referee: Mr. Brown set it?

Claimant: (Nodded affirmatively.)

Referee: Is this property worth more or less than \$50 [40] a month?

Claimant: No, I don't think so.

Referee: Or exactly \$50 a month?

(Testimony of Helmer F. Lindgren.)

Claimant: That's about right, I imagine.

Referee: Do you know what other farmers who have an operation of this size are paying for rent?

Claimant: No.

Referee: In Exhibit 10, which is a statment that you signed on December 23, 1954, you stated that beginning with October of that year your salary was reduced to \$75 a month, and that the reason for that reduction is due to the fact that the corporation was losing money. Then, you said, "It may be that we will dissolve it after the first of the year." Why were you considering in December, 1954 dissolving the corporation at the end of 1954?

Claimant: Because the corporation was losing money.

Referee: Is that the reason, or was it that you felt you would have you social security coverage and you didn't need the corporation any more?

Claimant: Probably is something in that, too.

Referee: Was that the main reason, that your social security coverage would be finished?

(No answer.)

Referee: Was that the main reason why you were considering dissolving the corporation? [41]

Claimant: Well, I, well——

Referee: What?

Claimant: I don't know.

Referee: It's your statement. I'm reading your signed statement. Your statement in Exhibit 10 is, "It may be that we will dissolve it after the

(Testimony of Helmer F. Lindgren.)

first of the year." Why did you make that statement? What was the reason?

Claimant: I don't know if I did it.

Referee: What is that?

Mr. Feltz: He doesn't know if he made that statement. Will you read the previous sentence before that?

Referee: You look at the whole exhibit. I'll put Exhibit 10 before Mr. Lindgren. Show him his signature on the reverse side of the page, first of all.

(Claimant examines Exhibit 10.)

Mr. Feltz: Here's Exhibit 9. Read that. The discussion of the Board of Directors.

(Claimant examines Exhibit 9.)

Referee: My question, Mr. Lindgren, is what was the reason why on December 23, 1954 you made the statement, "It may be that we will dissolve it"—meaning the corporation—"after the first of the year."?

Claimant: Because we were losing money.

Referee: Was that the only reason?

Claimant: Yes. [42]

Referee: Didn't you lose money in 1953?

Claimant: Yes.

Referee: Why didn't you consider dissolving it at the end of 1953?

Claimant: Well, because we thought it was going to get better, but it's been getting worse all the time.

Referee: Did you make any more loans to the

(Testimony of Helmer F. Lindgren.)

corporation after July, 1954? Did you make any loans in 1955?

Claimant: Not—I don't—I can't recall, but all the notes are there.

Referee: I know of four of them, three in 1953 and one in 1954. Did you lend the corporation money after July, 1954?

Claimant: No, sir.

Referee: No?

Claimant: No.

Referee: I don't have any further questions to ask of Mr. Lindgren at this time. I would like to ask Mr. Brown a question.

Mr. Feltz: May I ask Mr. Lindgren a question while we are on him?

Referee: Go ahead.

Mr. Feltz: The checks that you received from the corporation for wages, as noted on the corporation returns, was that always reported on your income tax return, Federal, for each year?

Claimant: Sure. [43]

Mr. Feltz: Did you attach the W-2 statements to those returns, those forms, small forms?

Claimant: Yes, sir.

Mr. Feltz: Were those checks paid to you by the corporation always cashed by you?

Claimant: Yes, sir.

Mr. Feltz: In other words, the corporation paid you \$3,600 in 1953. Did the corporation actually pay you in cash \$3,600?

Claimant: Yes, in checks. Yes.

(Testimony of Helmer F. Lindgren.)

Mr. Feltz: In other words, Mr. A—. What is your name?

Referee: Adelsheim.

Mr. Feltz: Mr. Adelsheim asked you how you loaned money to the corporation. Could you please explain how you loaned this additional money to the corporation, outside of the \$800 taken from your savings account; in other words, that gave rise to those notes?

Claimant: That is explained in one of the letters that you wrote.

Mr. Feltz: That is Exhibit 9. Is that correct? I think the exhibit would show that whenever the corporation needed money, you loaned money from cash you had on hand, from your own possession——

Claimant: Yes.

Mr. Feltz: ——actually made to the corporation?

Claimant: Yes.

Mr. Feltz: Have they been repaid, except that first one of \$600? [44]

Referee: The first one was \$800.

Mr. Feltz: I believe it was \$800, yes.

Claimant: Yes.

Mr. Feltz: Is there any asset of the corporation which you look to for the repayment of those notes?

Claimant: Certificates from the poultry Co-op.

Mr. Feltz: They belong to the corporation?

Claimant: Yes, sir.

Mr. Feltz: What are they valued at, at the time?

Claimant: Well——

(Testimony of Helmer F. Lindgren.)

Mr. Feltz: Have you checked the value, how much they are worth to the corporation?

Claimant: Two thousand five hundred.

Mr. Feltz: Two thousand five hundred owing to the corporation from the Co-op on these certificates?

Claimant: Yes.

Referee: When were these certificates transferred to the corporation's assets.

Claimant: As they accumulated from the——

Mr. Feltz: I think you know how this works——

Claimant: The Co-op pays dividends on the feed you buy during the year, and at the end of the year they make out certificates.

Referee: Rebates on feed?

Claimant: Yes, rebates on feed.

Referee: And what did you do with those certificates or [45] rebates when you got them?

Claimant: Kept them.

Referee: Kept them?

Claimant: Yes.

Referee: In what form did the rebate come to you? Was it in a check?

Claimant: I'll show them to you and I won't have to explain.

(Claimant hands papers to Referee.)

Mr. Brown: Those certificates, I might add, represent a dividend, or a rebate, similar to Metropolitan Life Insurance Company, on the purchases of feed. Whatever profit is made in the feed department is distributed among the people who pur-

(Testimony of Helmer F. Lindgren.)

chased feed based on the amount of feed purchased during the year.

Mr. Feltz: I would like to have those read into the record, showing the totals.

Referee: Just give me a chance.

Mr. Feltz: Okay.

Referee: You have handed me documents called "Capital Certificate, Oregon Egg Producers. They are all issued to Lindgren and Company and the date of issue is January 1. The first one is dated January 1, 1953. But, before I even read this into the record, how does it happen that it is issued to the Lindgren Company before the company was organized?

Claimant: They don't come out until April. [46]

Referee: When do they come out, did you say?

Claimant: I just got that last one, there——

Referee: The issue date is January 1, 1957. You got it when, this month?

Claimant: Yes.

Referee: How long ago?

Claimant: The last of March, a week ago.

Referee: There is one dated January 1, 1953 for \$550; one January 1, 1954 for \$320; one January 1, 1955 for \$580; one January 1, 1956 for \$500; and one January 1, 1957 for \$640.

Mr. Feltz: In other words, the value shown there, would that be the market value today if you turned them in?

Claimant: Yes, at any time.

(Testimony of Helmer F. Lindgren.)

Mr. Feltz: And you get interest at what per cent?

Claimant: Five per cent; I think all of them are five per cent.

Mr. Brown: The income from those——

Referee: Just a minute, please. According to Exhibit 29, the 1954 corporate excise tax returns show a feed rebate of \$675.57, and the certificate that you have handed me, which shows it was issued January 1, 1954 and which, presumably, came out in March, is for \$320. What is the explanation for the difference?

Claimant: The difference in cash that year?

Referee: The difference was in cash?

Claimant: Yes. [47]

Referee: You mean some of the time you get part of your rebate in certificates and part in cash?

Claimant: Yes.

Mr. Brown: True.

Referee: What determines how you will get it—certificates or cash?

Claimant: The Board of Directors would decide.

Mr. Brown: Of the Oregon Egg——

Referee: I'll hand these back to you, Mr. Feltz. Is your property owned jointly by yourself and your wife, Mr. Lindgren.

Claimant: Yes.

Mr. Feltz: Are you through with him on that? Are you still on the certificates?

Referee: No.

(Testimony of Helmer F. Lindgren.)

Mr. Feltz: I would like to go on with a few questions.

Referee: Go ahead.

Mr. Feltz: Mr. Lindgren, with respect to raising the question of your living expenses, how you and your wife had been living, during the year 1953 the returns show that the corporation paid you \$3,600, and the notes from the corporation, which you loaned money to the corporation on, are two notes of \$500 and \$600, other than the one you originally took care of out of your savings account. You loaned back \$1,100; that leaves a balance of \$2,500 cash which was available for you and your wife to live on. Did you live on this \$2,500? Can you live on \$2,500? [48]

Claimant: Easily.

Mr. Feltz: Easily? Thank you.

Referee: I would like to ask Mr. Brown a question.

Mr. Feltz: Okay.

Referee: No, I'll direct it to you, Mr. Feltz. In Exhibit 31, the names of the stockholders are Helmer Lindgren and Edith Lindgren. They received 25 shares. That seems to be inconsistent with what was said about Mr. Barker's share. What is the explanation?

Mr. Feltz: I think some of the records of the corporation might be—as at the time of your letter—showed only those two.

Mr. Brown: I can give you the explanation. When the corporation was formed, the Oregon law

(Testimony of Helmer F. Lindgren.)

required that a person be a shareholder to be a director. The legislature this year amended the law to make it no longer necessary.

Referee: Which year did the law——

Mr. Feltz: 1953.

Mr. Brown: The corporation was formed before the legislature met, and the requirement was still there, and the law didn't become effective until August, 1953. It was some later date the endorsement back was made, and I think Shirley did it before he went to Chicago.

Referee: I have no more questions, unless Mr. Lindgren or either of the witnesses have any questions to ask of each other.

Mr. Feltz: Well, I have something. I have a couple of questions, a couple of questions I want to ask. Mr. Lindgren——

Referee: Speak a little slower, please, so I can follow you. [49]

Mr. Feltz: The corporation, in the Federal income tax returns for 1953, 1954, and 1955, showed certain amounts paid to you by the corporation as wages. Did you receive these amounts as cash?

Claimant: Yes.

Mr. Feltz: Did you report this amount of wages on your income tax returns for the years 1953, 1954, and 1955 as wages from Lindgren and Company?

Claimant: Yes.

Mr. Feltz: You still have outstanding from the corporation certain notes, is that correct, from the

(Testimony of Helmer F. Lindgren.)

corporation, whatever the notes show in the record?

Claimant: Yes.

Mr. Feltz: You expect to be paid those notes from the corporation?

Claimant: Yes.

Mr. Feltz: From the certificates when they are eventually redeemed?

Claimant: Yes.

Mr. Feltz: That is all.

Referee: Any questions, Mr. Brown?

Mr. Brown: No.

Referee: Or do you have a statement?

Mr. Brown: I would like to make a statement on some of the questions Mr. Lindgren couldn't answer. Having been present at the time, I believe I can complete the record. First, on the rent, the [50] matter was discussed with Mr. Barker and myself as to the value of the land and buildings used by the corporation in connection with the business. This was the initial organization meeting, and I believe, if Mr. Lindgren thinks back, he may recall it, and it was determined they would have to pay rent, and the premises were worth between five and six thousand dollars, and the fair rent would be around \$50 a month, or thereabouts, if my information is correct, and the company didn't make any payments until 1954 or 1955, I'm not sure here without looking, but the indebtedness was acknowledged between the company and Mr. Lindgren to be an amount that would have to be

paid to him, at that time, and it was also considered that such payments should be made——

Referee: The value of the property was between five and six thousand dollars?

Mr. Brown: That's right.

Referee: Was that the fair market value or the appraised value for tax purposes?

Mr. Brown: No formal appraisal was made of it, but the fair value to determine the rent was determined to be that.

Referee: The fair market value?

Mr. Brown: Right.

Referee: Anything else?

Mr. Brown: One other point, concerning Mrs. Lindgren. I am sorry, in line of your questions, she couldn't be here today, but I think if you could physically see her, the testimony of Mr. Lindgren regarding her ability to perform work in these later years would be [51] substantiated because she is obviously unable, and has been unable, to render any substantial services after that date. Whether you are familiar with farming operations, I don't know. I returned from Redmond yesterday and as a typical farm wife, well, there were two injuries, there, in the insurance company, neither related to the employer, so it is quite common for the wife, where only the husband is employed, here in this area, to actually do some assistance when the husband isn't home.

Referee: There was an objection to my question, but Exhibit 4 is based upon information which

Mr. Lindgren, himself, supplied. It is true he didn't sign it, but, as I said, there is a presumption that the interview was correctly recorded. And that says that as of December, 1952 they were spending about an equal amount of time. Whether that is right or not, whether he understood what was being asked, may be in question. At that time he supplied the information upon which I based my question.

Mr. Brown: I was only attempting to explain that Mrs. Lindgren's value to the corporation or to its operation could only be nominal because of her physical incapacity to do any more than a very nominal amount of work in an emergency, knowing Mrs. Lindgren and knowing her physical condition in the first part of 1953. I believe the record—I'm not sure that it's clear that Snow-Williams Corporation was in existence in 1952.

Referee: That is shown.

Mr. Brown: And the discussion in the organizational meeting which was held in January—the completion of the transaction by name, [52] necessary to transfer, wasn't done until February, but it was agreed, I believe in January, 1953, that the corporation would take over the business as soon as the necessary formalities were completed. I thought that explanation might help clear the question asked Mr. Lindgren.

The Referee: According to Exhibit 29, I'm looking at the Supplemental Articles of Incorporation

of Snow-Williams Motors, Incorporated, shows there was a meeting on January 27, 1953.

Mr. Brown: That meeting would have been held on that date, but the meeting with me which led to this meeting would have been held prior to January 27. I want to clear the record on that, for whatever value it may have in reaching your determination. This was another corporation which we had in the office, which was inactive, and that saved a first filing fee, and that is the reason that it was used. It took me a few days to clear with the initial incorporators to use that corporation. I wanted to clear that they intended using the corporation from the first of the year.

Referee: I want to ask something else. Yesterday I spoke to Mr. Feltz on the telephone, Mr. Lindgren, and asked if we could have at the hearing the banking records, so far as your savings account is concerned. He said you didn't have a telephone and he couldn't reach you. Could those be supplied to me so I could examine——

Claimant: Sure.

Referee: You have a pass book for your savings account?

Claimant: Yes, sir.

Referee: Is the pass book you have now the one you had [53] in 1953?

Claimant: Yes, sir.

Referee: The same pass book?

Claimant: Yes, sir.

Referee: Could you make that available to me?

(Testimony of Helmer F. Lindgren.)

Claimant: I could bring it in.

Referee: Would there be any objection by anyone to my examining that and making whatever portions of it I think pertinent a part of the record.

Mr. Feltz: No objection.

Referee: I would simply reopen the record and read into it whatever the entries that would seem pertinent might show. Is that agreeable?

Mr. Feltz: Agreeable.

Referee: Could you bring it or send it——

Mr. Feltz: You bring it to the office and I'll look at it and then bring it down.

Referee: Can you do that this week?

Mr. Brown: Why don't you bring it today, late this afternoon, and get all the record made up?

Mr. Feltz: I'll bring it today or tomorrow.

Referee: This afternoon would be better. I have other commitments tomorrow.

Mr. Feltz: This afternoon.

Referee: Is there anything more of an evidentiary nature [54] that you want to bring to my attention?

Mr. Feltz: I don't think so.

Referee: Do you wish to make an oral argument?

Mr. Feltz: I would like to make a brief——

Referee: I'm sorry, there is one other thing. Do you have the records of the checking account of the corporation with you?

Mr. Feltz: No. No, Mr. Lindgren just brought with him the checks which you have received,

(Testimony of Helmer F. Lindgren.)

which you already have.

Claimant: That have been examined.

Mr. Feltz: He hasn't seen them.

Claimant: Isn't there a record of it?

Mr. Feltz: I guess they just made photostats of your salary checks, not of the rest.

Referee: Just the salary checks.

Mr. Feltz: Not showing, like the payment of feed and things like that.

Referee: Do you have your monthly statements from the corporation's savings account starting in——

Claimant: Checking account.

Referee: I'm sorry, checking account, starting with February, 1953?

Claimant: Sure.

Referee: Can you make those available?

Claimant: Sure.

Referee: Would you bring those to your attorney? [55]

Claimant: Yes, sir.

Referee: Would it be agreeable to you, Mr. Feltz, if I reopened the record to include in addition to the portions of the savings account the record of the checking account as well?

Mr. Feltz: No objection.

Claimant: Do you want the statements?

Referee: I would like to see the statements.

Claimant: Up to date?

Referee: Up to date if you have them.

Claimant: I have everything.

Referee: Starting with January or February, 1953. All right, Mr. Feltz, go ahead.

Mr. Feltz: The record shows from the evidence introduced here that the corporation, Lindgren and Company, paid to Mr. Lindgren as wages the sum of \$3,600 in 1953, \$2,925 in 1954, and eleven hundred twenty-five in 1955. Mr. Lindgren has testified, and the record shows from what he has introduced in checks, that Mr. Lindgren was paid this amount in cash, and that during the year 1953 he loaned to the corporation to help it through it's first initial year, \$1,100, from other cash on hand that he had. The original investment of \$800 was from his savings account, so that there was only \$1,100 loaned to the corporation in 1953. In 1954 the record shows from the notes on hand that this taxpayer, Mr. Lindgren, received \$2,925 cash from the corporation as wages, and loaned to the corporation in that year \$1,000. Now, we feel at a loss to understand how the Social Security Administration in its determination [56] finds that Mr. Lindgren received no taxable wages in the years 1953 or 1954, but only repayments of loans. The loans are shown to be \$1,100 in one year and \$1,000 in another year, and that except in the first quarter of 1954 he received no taxable wages. The record definitely shows he was paid wages subject to social security, and that he has treated the corporation as entirely separate from himself, and has loaned money to the corporation, of which he has loans outstanding which will be paid from certificates

of the Oregon Egg Producers, noted in the record herein. Whereas, we believe that the record definitely shows that the taxpayer is entitled to social security benefits on the basis of wages paid to him during the years 1953 and 1954; also, there is no disagreement between the taxpayer and the Government with respect to the purpose of establishing this corporation. He directly testified that the corporation was established in order to obtain the benefits of social security, and there is no law against it.

Referee: There is nothing improper in that.

Mr. Feltz: No law against it. The only question is the determination by the Social Security Administration that he did not receive wages from the corporation. I think the record and evidence shows he did receive wages and loaned back certain amounts of money, \$1,100 in one year and \$1,000 in another year, to help the corporation through the early years, but that money will be repaid to him and is secured by several certificates of Oregon Egg.

Referee: In your argument you emphasize that he is entitled to benefits based upon the wages paid in 1953 and 1954. In the issue which I stated orally as the issue which was before me for decision, [57] as well as in the Notice of Hearing, a copy of which was sent to you two attorneys, I indicated that the fact issue concerned whether remuneration reported for the claimant by Lindgren and Company, Incorporated, commencing January, 1953 constituted wages under section 209 of the Social Security Act

I'm going to amend, if it is agreeable to you, I'm going to amend the factual matters upon which the general issue will depend. I'm going to limit it to the years 1953 and 1954.

Mr. Feltz: I think it would be, the benefits would be, based upon those years.

Referee: Is it agreeable to you if no findings are made with respect to 1955?

Mr. Brown: (Nodded affirmatively.)

Referee: Your answer is "Yes"?

Mr. Brown: Yes, that's correct.

Referee: It is understood that even though my notice indicated that I would consider remuneration commencing with January, 1953, and although I earlier indicated in my oral statement of the issue that the fact upon which the general issue would depend would be unlimited as to years, it is now agreed that that is amended and I will limit my findings of fact to 1953 and 1954?

Mr. Feltz: The evidence you have, or exhibits, will remain part of the record?

Referee: That will remain part of the record. One reason I am doing that is, as you, first of all, correctly pointed out, if he is entitled to benefits it would be upon the two years and, under [58] the applicable provisions with regard to computation of benefits, the low year 1955 would be stricken anyway.

Mr. Feltz: The low year——

Referee: The low year 1955, that is. Also, the documentary evidence is more complete with respect to 1953 and 1954 than with respect to 1955. Those

are my reasons for limiting this decision to 1953 and 1954. You understand——

Mr. Feltz: Yes.

Referee: I take it that is agreeable with you.

Mr. Feltz: Yes.

Mr. Brown: Correct.

Referee: Anything further you want to submit to me, other than the monthly statements of the corporation's checking account and the pass book which is evidence of Mr. Lindgren's personal savings account. Is there anything in addition by way of factual information or argument?

Mr. Brown: There is only one point I might ask you. Is there any question in your mind as to the negotiability of these certificates from the Co-op, of their being worth, and readily negotiable, at 100 cents on the dollar?

Referee: I have no question about that. I don't know anything about the Oregon Egg Producers or about the marketability of its certificates but——

Mr. Feltz: He has testified——

Mr. Brown: He did testify, did he not—— [59]

Referee: There is testimony in the record that they are negotiable at face value, and——

Mr. Brown: I would like my testimony to be that, too, since I do work for them and am there and I know——

Referee: I'll accept your testimony.

Mr. Brown: I think it might be relevant in your finding as to the corporation's ability to repay these notes.

Referee: Anything further?

Mr. Feltz: No.

Mr. Brown: Not that I can think of.

Referee: Have you had a fair opportunity to present testimony and arguments today?

Mr. Feltz: We have.

Mr. Brown: We have.

Referee: The record will be held open, if I consider it necessary, to incorporate into the record information from the bank records, but, apart from that, the record is closed.

Mr. Feltz: If you do incorporate anything from those records, we would like to reserve comments.

Referee: You would like to see what is incorporated?

Mr. Feltz: I have never seen some of them.

Referee: Do you want to be present when I reopen the record to read into the record those entries which I consider pertinent; is that your point?

Mr. Feltz: After I see the things, it might be better—— [60]

Referee: After the banking records have been examined by you, you will pass them on to me?

Mr. Feltz: I will bring them down personally.

Referee: This afternoon?

Mr. Feltz: Yes.

Referee: The hearing is now closed.

Hearing closed: 11:45 a.m.

Hearing Reopened

Referee: Let the record show that the record has been reopened at 3:45 p.m., April 3, 1957, and that Mr. Feltz is here with the bank records which

were requested this morning, and which it was agreed would be produced. I have been handed a pass book for a savings account, the joint account of Edith or H. Lindgren. The first entry is March 20, 1942, First National Bank of Portland, and the most recent entry is January 23, 1956. I will read the transactions, that is, the withdrawals, deposits, and balance. I'll start with October 8, 1952, the date, \$109.85, balance—do you want to look on with me to see if this is accurate—\$1,016.60.

Mr. Feltz: No, that's all right.

Referee: October 16, 1952, withdrawal, \$110—I think I'll have these itemized in columns: date, deposit, withdrawal, interest, balance: [61]

Date	Deposit	Withdrawal	Interest	Balance
10/16/52		\$110.00		\$ 906.16
2/13/53		800.00		106.16
12/31/52			\$9.06	115.32
6/30/53			1.15	116.37
12/31/53			1.16	117.53
6/30/54			1.18	118.71
12/31/54			1.19	119.90
1/15/55	\$ 500.22			620.12
2/11/55		100.00		520.12
3/ 8/55		50.00		470.12
4/26/55	2,000.00			2,470.12
5/23/55		100.00		2,370.12
6/30/55			2.95	2,373.07

October 10—do you have enough time for this?

Mr. Feltz: How many more are there there?

Referee: I think that's sufficient for this account. Let it be shown that I'm not going to read the entries all the way down to January 23, 1956. It covers the period with which we are concerned. Now, I have been handed a pass book for another savings account, this one with the United States National Bank of Portland for H. or Mrs. Edith Lindgren. The initial entry is May 24, 1943. As of December 12, 1952, there is a balance of \$1,930.24. I'll do this the same way:

Date	Deposit	Withdrawal	Interest	Balance
12/31/52			\$20.30	\$1,950.54
6/30/53			19.50	1,970.04
11/13/53		\$500.00		1,470.04
12/31/53			17.20	1,487.24
6/21/54		200.00		1,287.24
6/30/54			14.87	1,302.11
7/28/54		500.00		802.11
12/31/54			8.02	810.13
6/30/55			8.10	818.23

That is as far as I need to go.

Mr. Feltz: Do you want to say in that last one—did you [62] get that \$2,000 deposit on the record? If you want an explanation of that, that is the sale of real property for \$2,000, if there is any question on that.

Referee: You have handed me an earnest money receipt dated April 20, 1955, and it shows earnest money contract \$2,000 for the sale of certain real property in Clackamas County, the total sale price

to be \$2,000. I'll hand the earnest money receipt back to you, and the pass books which you have handed me. Any other savings account?

Mr. Feltz: Yes, that's (pointing) the last one.

Referee: This one is a third pass book and the name of the owner of the account is not shown on the pass book. Mr. Lindgren presented this to you, did he?

Mr. Feltz: Yes, it belongs to him.

Referee: He said he had three savings accounts. Is——

Mr. Feltz: Three savings accounts?

Referee: He said that today, I believe.

Mr. Feltz: At least, that is what he turned over to me.

Referee: This is with the First National Bank of Portland. It was opened on October 15, 1942. As of March 3, 1952, there was a balance of \$1,591.61. Thereafter, there are nine transactions involving posting of interest to the account. I will not read those into the record. There are no deposits. There were three withdrawals—April 20, 1954, \$1,000, leaving a balance at that time of \$646.22; November 4, 1956, \$400, leaving a balance of \$294.88; November 5, 1956, same date, a withdrawal of \$294.88, leaving a balance of zero. [63]

Mr. Feltz: The explanation on the \$1,000 withdrawal was to buy chinchillas, not money deposited in the corporation. These take care of all the savings accounts. Here, I'll hand you herewith all the bank statements and the initial——

Referee: If I understand it correctly, there's

only one; the corporation has only had one bank account, a checking account?

Mr. Feltz: Checking account.

Referee: With the First National Bank of Portland?

Mr. Feltz: That is correct.

Referee: You have handed me a bank book which is for the credit of Lindberg and Company, the southeast branch, incidentally, of the bank. It shows, this pass book shows, only two entries: February 13, 1953, deposit \$800; February 18, 1953, deposit, \$461.09.

Mr. Feltz: That is correct. The remainder of his deposits were made through slips later. The only checks that would be missing from there (pointing to a sheaf of papers) would be the ones we pulled out for the wages.

Referee: I'm not going to read these into the record. I see what they are. They are monthly statements. I have examined only the ones—I have been handed a sheaf of monthly statements, the cancelled checks attached, showing in detail the deposits, the dates of the transactions, and the balances. I have examined the ones for March, April, and May, 1953. The one for March, the first transaction, shows a balance on February 25, 1953 of \$1,341.04. I should say, for the record, that all of the checks I have examined for March, April, May, and June are [64] made out to Lindgren and Company and signed by Edith Lindgren. I'll show you a check dated April 23, 1953 made out to the

Director of Internal Revenue. Is that for personal income tax returns?

Mr. Feltz: I think it would be for Federal withholding, and social security.

Referee: Federal withholding?

Mr. Feltz: I think he was withholding on his—let's see, it would be \$900. That would be about 20 percent of \$900, \$140.40; if we had a Federal withholding report, I think you would find it. That's supposed to be the amount withheld.

Referee: A quarterly report of withholding, is that what you mean?

Mr. Feltz: Is that in April?

Referee: Yes.

Mr. Feltz: Yes, filed in March and paid in April.

Referee: Now, according to Exhibit 21, the salary check dated March 31, 19—wait a minute, I—

Mr. Feltz: It would be dated in March, I believe.

Referee: Dated March 30, 1953, shows withholding of Federal withholding tax of \$113.40, as shown by Exhibit 21. Why would the check be for \$140.40? This is a check dated April 23, 19—

Mr. Feltz: Add \$113.40 and add \$13.50. It ties in. Makes \$140.40. This is the amount of withholding; the employer pays the other.

Referee: The social security tax should be doubled; is that your point? [65]

Mr. Feltz: Yes.

Referee: I may get these (pointing to papers) all mixed up; I hope that doesn't matter.

Mr. Feltz: I don't believe so.

Referee: Do you have the salary check, the original check, for September 30, 1953?

Mr. Feltz: Yes.

Referee: May I see it please?

(Mr. Feltz hands check to referee.)

Referee: What is this perforation, it's—the late——

Mr. Feltz: November 1, 1953.

Referee: Thank you; that is the original of a check, a photostatic copy of which is included in Exhibit 21. I want the record to show that I have examined the monthly statements for the account of Lindgren and Company commencing with the first one, which started with February, 1953, through December, 1954. There have been presented to me bank statements for each of the months in that period, and I think, with each, there has also been presented cancelled checks which compare exactly with the checks in detail as listed on each monthly bank statement, with the exception of the fact that salary checks issued in 1953 and 1954, as shown by Exhibit 21, the original of those checks are not included. They are here with you, are they not, Mr. Feltz?

Mr. Feltz: Yes.

Referee: I don't need them. That is the reason those checks are not included, but, except for those, all of the other checks [66] are shown to be included in the bank statements and cancelled checks which have been presented to me for

the two years in question, 1953 and 1954. I'm not going on into 1955. I may have gotten them all mixed up; in that case, I apologize.

Mr. Feltz: That's all right. 1956 and 1957 are here.

Referee: I am not going to read them in since the question is limited to 1953 and 1954, in accordance with our discussion this morning.

Mr. Feltz: Okay.

Referee: Receipts for deposits have also been presented to me for the years in question. I'm not going to check these as against the deposits shown on the monthly bank statements. I'll hand these deposit slips back to you. (Referee hands papers to Mr. Feltz.)

Mr. Feltz: Thank you.

Referee: This is for 1955; I'll hand that back to you also. I believe that does it. I appreciate your coming in.

Mr. Feltz: How long do you think it will be before you have that determination, approximately how long does it usually take?

Referee: Possibly next week, or the week after.

Mr. Feltz: That will be fine.

Referee: I think I can proceed to decision pretty quickly.

Mr. Feltz: Thank you.

Referee: The reopened hearing is now closed.
4:20 p.m. [67]

Certification

We have read the foregoing transcript and

hereby certify it is a true and accurate record of the testimony taken at the hearing.

/s/ EDWARD K. ADELSHEIM,
Referee.

/s/ ADELE L. KELLAR,
Reporter.

* * * *

EXHIBIT No. 25

1000 Portland, Oregon, July 1st, 1954

Lindgren & Co. after date, without grace on demand, promise to pay to the order of H. Lindgren, at 7921 S.E. King Rd., Portland 22, Oregon, one thousand dollars in lawful money of the United States of America of the present standard value, with interest thereon in like lawful money, at the rate of 2 per cent, per annual from July 1st, 1954 until paid for value received, interest to be paid per annual and if not so paid the whole sum of both principal and interest to become immediately due, and collectible at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof, promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum in like lawful money as the Court may adjudge reasonable as Attorney's fees to be allowed in said suit or action.

Due, 19.....

/s/ H. LINDGREN,
/s/ EDITH LINDGREN.

mand, promise to pay to the order of H. Lindgren, at 7921 S.E. King Rd., Portland 22, Oregon, eight hundred dollars in lawful money of the United States of America of the present standard value, with interest thereon in like lawful money, at the rate of 2 per cent, per annual from Feb. 13, 1953 until paid for value received, interest to be paid per annual and if not so paid the whole sum of both principal and interest to become immediately due, and collectible at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum in like lawful money as the Court may adjudge reasonable as Attorney's fees to be allowed in said suit or action.

Due, 19.....

/s/ H. LINDGREN,

/s/ EDITH LINDGREN.

[Written across face of note: \$600 paid
12/31/55. H. Lindgren.]

I certify that this is a true and exact copy of the original.

/s/ HERMAN M. JOHNSON,

Assistant Claim Supervisor, Portland, Oregon
5/7/57.

W. E. states that the \$600 paid on this note is all that the corporation has been able to repay him on these notes to date.—HMJ.

STATE OF OREGON

Excise Tax Return

For Calendar Year 1954

EXHIBIT No. 29

Return for 1954 to 1955

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS LYNDGREN AND COMPANY 7921 SOUTHEAST KINGS ROAD PORTLAND, OREGON	1954 (Do not write here) Ck Ca MO
---	--

Incorporation **1952** Under laws of what state **Oregon** Kind of business **Caleben Grinding**
 with books are on cash or accrual basis **Cash** Have Forms 96 and 99 been filed? (See instructions) **Yes**
 consolidated return of two or more corporations? **No** If so, state how many **One**

GROSS INCOME		
From Trading or Manufacturing, Less Returns and Allowances		9,434 99
Cost Goods Sold:		
Inventory at beginning of year	None	
Merchandise bought for sale	Food	6,126 74
Cost manufacturing (From Schedule A)		
Total lines (a), (b), and (c)		6,126 74
Inventory at end of year	None	
Profit from Trading or Manufacturing (Item 1 minus Item 2)		3,308 25
Profit from other than Trading or Manufacturing (State source):		
Bank Deposits, Loans, Notes, Mortgages, Corporation Bonds, etc.		43 90
Bonds or other obligations of a State, County, or Municipality		
Obligations of the United States		
Dividends		
Income on Sale of Real Estate, Stocks, Bonds, other Assets (Schedule B)		
Dividend Stock of Resident and Nonresident Corporations (Schedule F)		
Other (State nature of income)		
TOTAL GROSS INCOME (Sum of Items 1 to 12, inclusive)		3,352 15

DEDUCTIONS		
Salaries of Officers (From Schedule C)		2,925 00
Business Property		
Depreciation (From Schedule D)		
Interest (From Schedule E)		68 30
Expenses incurred in Business (Submit Schedule)		
Depletion (From Schedule G)		20 00
Depletion (from exhaustion, wear, tear, obsolescence) (From Schedule H)		
Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit Schedule)		375 84
Other Deductions (Explain below):		
Salaries and wages (Not included in Items 1, 14, or 16 above)		
TOTAL DEDUCTIONS (Sum of Items 14 to 22, inclusive)		3,389 14
NET INCOME (From Item 23 minus Item 24)		(35 99)

COMPUTATION OF TAX		
Income (Item 25 above, or allocation to Oregon from Schedule J)		(35 99)
State Tax (8% of Item 26)		None
Other Oregon Personal Property Taxes (Not to exceed 50% of Item 27)		None
State Tax (Item 27 minus Item 28) (Not Less Than \$10. See Instructions)		10 00

SCHEDULE J—ALLOCATION OF INCOME

To be completed by every corporation doing business both within and without the state

	In Oregon	Everywhere	Per Cent in Oregon
1. Average value of tangible property used in the business at beginning and end of year			
2. Wages, salaries, and other compensation of employees			
3. Sales, less returns and allowances (See Instruction 21)			
4. Total Per Cent (Sum of the percentages above)			
5. Average Per Cent (1/2 of Item 4)			
6. Net income from business both within and without the state (See Instruction 27)			
7. (a) Oregon personal property taxes (in Item 9, Schedule L)			
8. (b) Nonapportionable income (See Instruction 27)			
9. Total net income subject to allocation (Item 6 minus Item 7)			
10. Oregon allocation (Item 9 multiplied by Item 5)			
11. (a) Oregon personal property taxes (Item 7 (a) above)			
12. (b) Nonapportionable income assignable to Oregon			
13. Adjusted Oregon net income (Item 10 plus Item 12—Carry to line 26, page 1)			

SCHEDULE K—BALANCE SHEET

ITEMS	BEGINNING OF INCOME PERIOD		END OF INCOME PERIOD	
	Amount	Total	Amount	Total
ASSETS				
1. Cash				
2. Notes Receivable				
3. Accounts Receivable				
Less reserve for bad debts				
4. Inventories				
Raw materials				
Work in process				
Finished goods				
Supplies				
5. Investments (describe fully):				
Stock Shares—Alcoa				
Other Assets - Goodwill	800 00	800 00	800 00	800 00
6. Deferred charges:				
Prepaid Insurance				
Prepaid taxes				
7. Physical assets:				
Land				
Buildings				
Machinery and equipment	200 00		200 00	
Furniture and fixtures				
Delivery equipment				
	200 00		200 00	
Depreciation and depletion res.	140 00	60 00	160 00	40 00
8. Other assets (describe fully):				
TOTAL ASSETS		860 00		840 00
LIABILITIES AND CAPITAL				
9. Notes payable				
10. Accounts payable				
11. Accrued expenses (describe fully):				
12. Other liabilities (describe fully):				
Due Officers		4 17		30 16
13. Capital Stock:				
Preferred (less stock in treasury)	2,500 00	2,500 00	2,500 00	2,500 00
Common (less stock in treasury)				
Plus		(2,644 17)		(2,690 16)
14. Undivided profits		860 00		840 00
TOTAL LIABILITIES AND CAPITAL				

EXHIBIT No. 29

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SCHEDULE 1 RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS Page 3

and undivided profits as shown by balance sheet at beginning of period 1/1/54 (2,644.17)
 Income from Item 23, page 1 of this return (33.99)
 Taxable income (itemization required) None None
 Charges against reserves for bad debts if Item 20, page 1 of this return is in addition to a reserve None
 Charges against reserves for contingencies, etc. (itemization required) None None
 Credits to surplus (itemization required) None None
TOTAL OF LINES 1 TO 8 (1,680.16)

Dividends paid during period (State if cash, stock or other property)
 State(s) paid None Character None
 State(s) paid None Character None
 Allowable deductions
 Region excise tax 10.00
 Federal income and excess-profits taxes
 Taxes on, or measured by, income, paid to other states
 Region personal property tax
 Improvement taxes tending to increase the value of the property assessed
 Furniture, fixtures, additions, or betterments shown as expense on the books
 Replacements and renewals
 Insurance premiums on life of any officer or employee where corporation is directly or indirectly a beneficiary
 Additions to bad debt reserves not included in Item 20, page 1
 Other unallowable deductions 10.00
 Debits to surplus (to be detailed) None None
TOTAL OF LINES 9 TO 10 10.00
NET SURPLUS AND UNDIVIDED PROFITS AS SHOWN BY BALANCE SHEET (Line 7 minus line 11) (1,690.16)

A. M—RECONCILIATION: DEPRECIATION RESERVE

Reserve at beginning of period 140.00
 Depreciation expense during period 20.00
 Other adjustments (Detail:)
 Reserve at end of period 160.00

SCH. D.—RECONCILIATION: BAD DEBT RESERVE

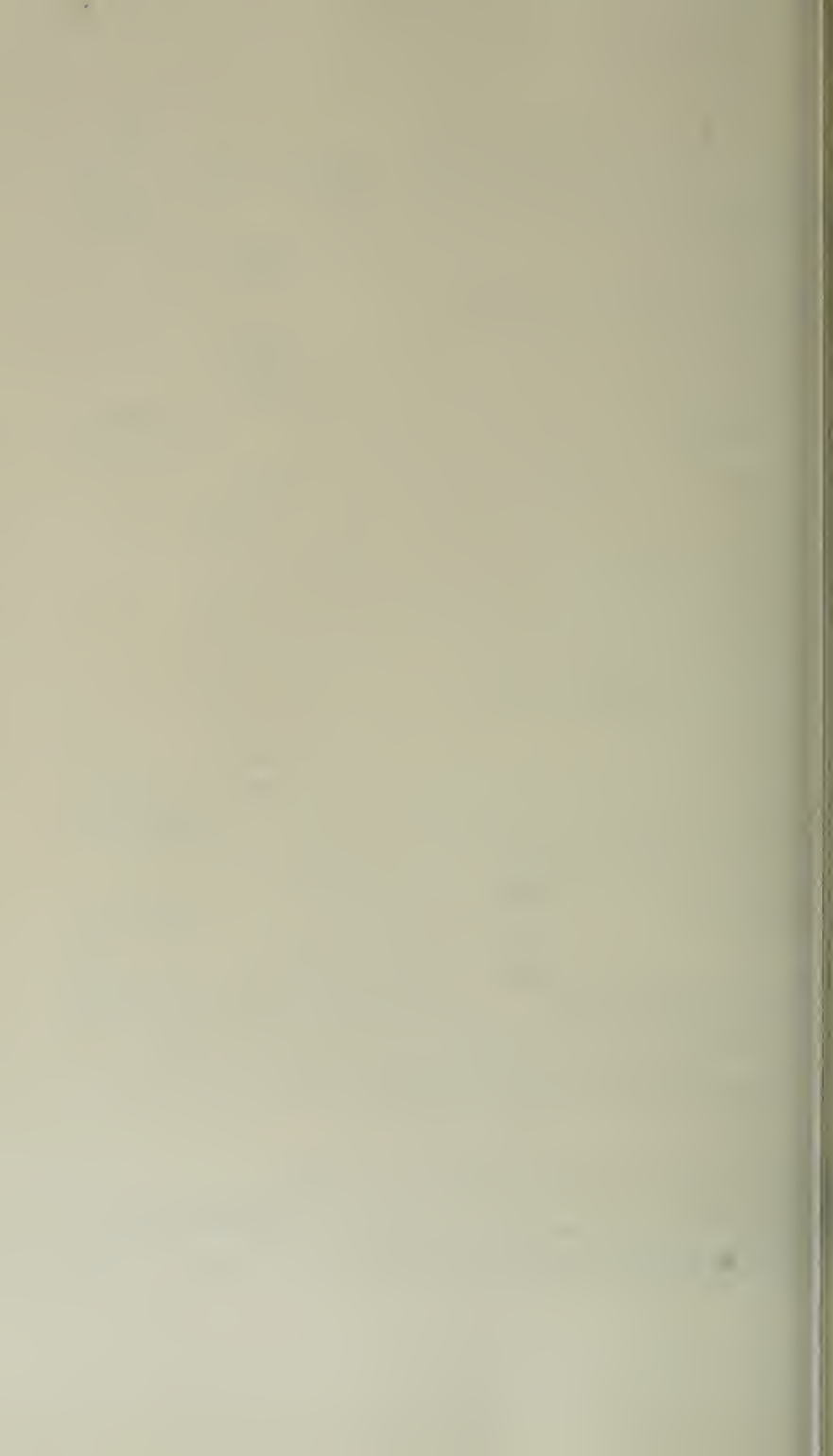
1. Reserve at beginning of period
 2. Additions to reserve during period CASH BASIS
 3. Other credits (Detail)
 4. TOTAL OF LINES 1 TO 3
 5. Charges against reserve during period
 6. Other debits (Detail)
 7. TOTAL OF LINES 5 AND 6
 8. Reserve at end of period (line 4 minus line 7)

AFFILIATIONS WITH OTHER CORPORATIONS

The following questions must be answered:

1. Does the corporation own directly or control through closely affiliated interests or by a nominee or nominees 85% or more of the voting capital stock of another corporation or of other corporations? No
 2. Is more than 10% of your outstanding voting capital stock owned by another corporation or by two or more affiliated corporations, or more of your outstanding voting capital stock as well as 85% or more of the outstanding voting capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals in partnership? No
 Answer to questions 1, 2 and 3 or to any of them is "yes", list names of corporations

3. Has the corporation filed a consolidated return for the preceding taxable year? No
 4. Has the corporation filed a return under the same name for the preceding taxable year? Yes
 5. Has the corporation in any way an outgrowth, result, continuation or reorganization of a business or businesses in existence during this or any prior year since December 31, 1929? Yes
 If "yes", give name and address of each predecessor's business and the date of the change in entity Sam Williams Notup Co.
 6. Were any asset values increased or decreased? None
 7. Were inventories valued at cost or cost or market whichever is lower? If other basis was used, state why used and give date inventory was last reconciled with stock None



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Page 4

1952-53

[illegible]

Item	Amount
(Enter as Item 16)	
Salaries and wages	

[illegible]

1. County	2. Year of Assessment	3. Date Paid	4. Amount
	NONE		

[illegible]

Date April 15, 1955

Exhibit No. 29—(Continued)

LINDGREN AND COMPANY1954SCHEDULE 1Income

Fryer Sales	\$ 7,950.63
Meat Sales	643.09
Egg Sales	8.53
Sack Sales	158.72
Feed Rebate	<u>675.57</u>
Total	<u>\$ 1,436.52</u>

Other Deductions

Briquets	\$ 22.40
Chickens	16.00
Hay	175.68
Electricity	122.76
Calves	<u>39.00</u>
Total	<u>\$ 375.84</u>

Taxes

Social Security	\$ 58.50
Corporation License	<u>10.00</u>
Total	<u>\$ 68.50</u>

STATE OF OREGON

Corporation Excise Tax Return

For Calendar Year 1953

Exhibit No. 29—(Continued)

Year From 1953 to 1954

Return with the STATE TAX
RETURN, SALEM, OREGON, on or
before the fifteenth day
of April in 1954. Fiscal year returns
must be filed on or before the fifteenth day
of the month following the close of
the year. Corporations authorized to do
business must pay a minimum excise
tax of \$10 even if the return shows a net

and interest will be assessed on re-
turn after the due date.

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

LINDGREN AND COMPANY

7921 SOUTHEAST KINGS ROAD

PORTLAND, OREGON

1953

(Do not write here)

Ck

Cs

MO

Incorporation 1952 Under laws of what state Oregon Kind of business Chicken Growing
Whether books are on cash or accrual basis Cash Have Forms 96 and 99 been filed? (See instructions) Yes
Is consolidated return of two or more corporations? No If so, state how many One

GROSS INCOME		See Schedule 1	
(a) Sales from Trading or Manufacturing, Less Returns and Allowances			9,147 42
(b) Cost of Goods Sold			
(Inventory at beginning of year)			
(Merchandise bought for sale—Food)	6,877 73		
(Cost of manufacturing (From Schedule A))			
(Total of lines (a), (b), and (c))	6,877 73		
(Less inventory at end of year)			6,877 73
(d) Profit from Trading or Manufacturing (Item a minus Item b)			2,269 69
(e) Profit from other than Trading or Manufacturing (State its source)			
(Interest on Bank Deposits, Loans, Notes, Mortgages, Corporation Bonds, etc.)			27 50
(Interest on Bonds or other obligations of a State, County, or Municipality)			
(Interest on Obligations of the United States)			
(Rents)			
(Dividends on Stock of Resident and Nonresident Corporations (Schedule F))			
(Or Income (State nature of income)—Food Rebate)			556 73
TOTAL INCOME (Sum of Items 1 to 12 inclusive)			2,853 94

DEDUCTIONS		
(Compensation of Officers (From Schedule C))		3,600 00
(Depreciation on Business Property)		
(Rents (From Schedule D))		
(Interest)		
(Taxes (From Schedule E))	See Schedule 1	64 00
(Losses incurred in Business (Submit Schedule))		
(Depreciation (From Schedule G))		
(Depreciation (from exhaustion, wear, tear, obsolescence) (From Schedule I))		20 00
(Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit Schedule))		
(Other Deductions (Explain below))	See Schedule 1	804 11
(Salaries and wages (Not included in Items 1, 16 or 18 above))		
TOTAL DEDUCTIONS (Sum of Items 16 to 22 inclusive)		4,488 11
NET INCOME (Item 13 minus Item 24)		865 83

COMPUTATION OF TAX		
(Income (Item 25 above, or allocation to Oregon from Schedule J))		(1,644 17)
(Excise Tax (8% of Item 26))		None
(Tax for Oregon Personal Property Taxes (Not to exceed 50% of Item 27))		
(Miscellaneous Tax (Item 27 minus Item 28) (Not Less Than \$10. See Instructions))		10 00

SCHEDULE J—ALLOCATION OF INCOME

To be completed by every corporation doing business both within and without the state

	In Oregon	Everywhere	Per Cent in Oregon
Average value of tangible property used in the business at beginning and end of year			
Wages, salaries, and other compensation of employees			
Gross sales, less returns and allowances (See Instruction 20)			
Total Per Cent (Sum of the percentages above)			
Average Per Cent (1/2 of Item 6)			
Net income from business both within and without the state (See Instruction 27)			
Less (a) Oregon personal property taxes (in Item 8 Schedule L)			
(b) Nonapportionable income (See Instruction 27)			
Total net income subject to allocation (Item 8 minus Item 7)			
Oregon allocation (Item 8 multiplied by Item 6)			
Add (a) Oregon personal property taxes (Item 7 (a) above)			
(b) Nonapportionable income assignable to Oregon			
Adjusted Oregon net income (Item 9 plus Item 10—Carry to line 20 page 1)			

SCHEDULE K—BALANCE SHEET

ITEMS	BEGINNING OF INCOME PERIOD		END OF INCOME PERIOD	
	Amount	1/1/53	Amount	12/31/53
ASSETS				
Cash				
Notes Receivable				
Accounts Receivable				
Less reserve for bad debts				
Prepaid expenses				
Raw materials				
Work in process				
Finished goods				
Supplies				
Investments—debt security				
Stock Subscriptions	2,500.00			
Other Assets - Goodwill		2,500.00	800.00	800.00
Deferred charges				
Prepaid insurance				
Prepaid taxes				
Capital assets				
Land				
Buildings				
Machinery and equipment			200.00	
Furniture and fixtures				
Delivery equipment				
			200.00	
Depreciation and depletion res.			140.00	60.00
		2,500.00		860.00
LIABILITIES AND CAPITAL				
Accounts payable				
Notes payable				
Long term debt				
Other liabilities				
Due Officers				4.17
Stock				
Preferred stock				
Common stock	2,500.00	2,500.00	2,500.00	2,500.00
				(1,644.17)
TOTAL LIABILITIES AND CAPITAL		2,500.00		860.00

EXHIBIT No. 29

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SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

Page 3

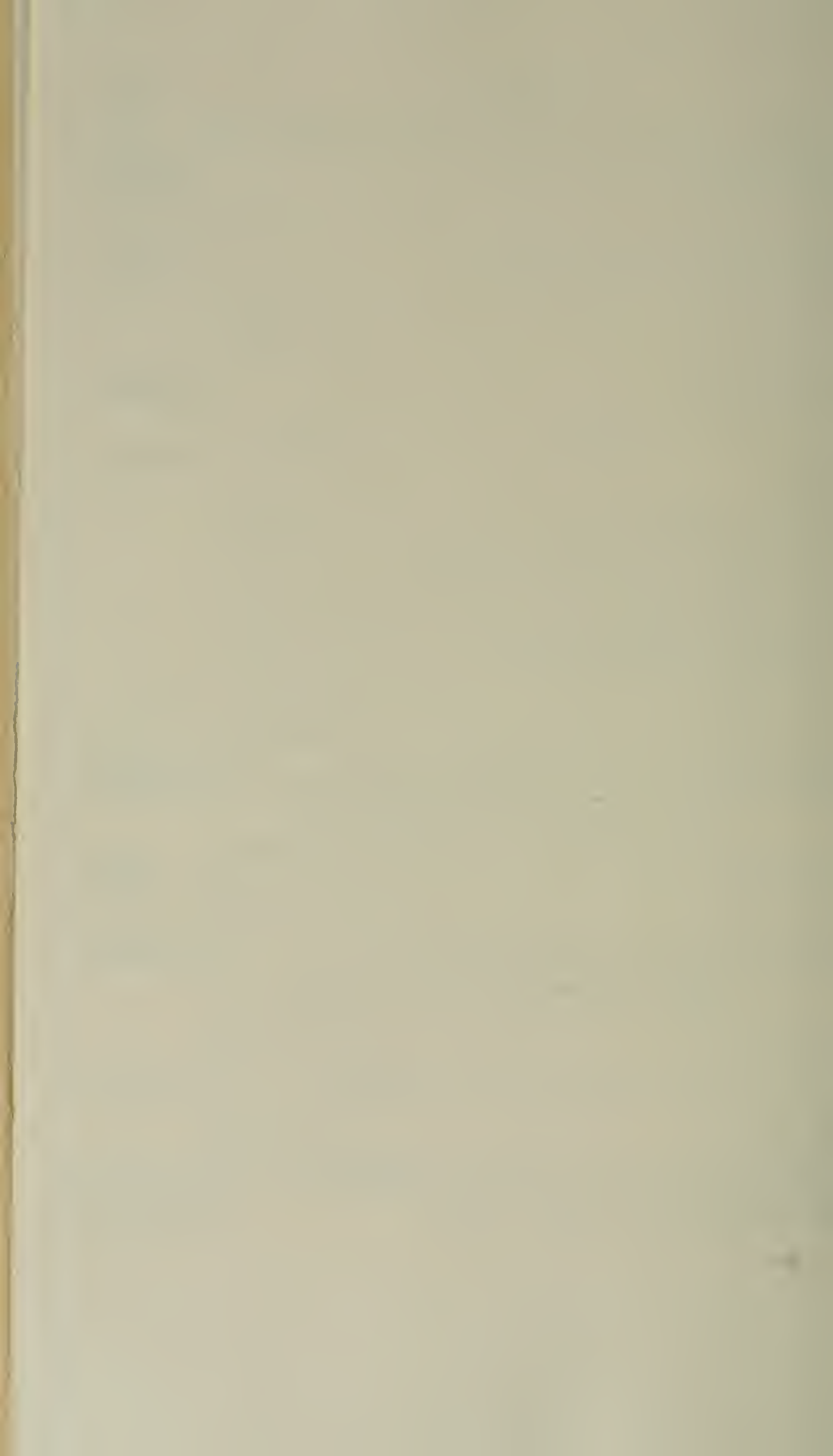
Surplus and undivided profits as shown by balance sheet at beginning of period		None	
Net income from Item 25, page 1 of this return		(2,644.17)	
Non-taxable income (itemization required)			
Charges against reserves for bad debts if item 20, page 1 of this return is not an addition to a reserve		None	
Charges against reserves for contingencies, etc. (itemization required)			
Other credits to surplus (itemization required)			
TOTAL OF LINES 1 TO 6		None	(2,644.17)
Dividends paid during period (State if cash stock or other property):			
Date(s) paid Character	None		None
Date(s) paid Character			
Unallowable deductions:			
Oregon excise tax			
Federal income and excess-profits taxes			
Taxes on, or measured by, income, paid to other states			
Oregon personal property tax	None		
Improvement taxes tending to increase the value of the property assessed			
Furniture, fixtures, additions, or betterments shown as expense on the books			
Replacements and renewals			
Insurance premiums on life of any officer or employee where corporation is directly or indirectly a beneficiary			
Additions to bad debt reserves not included in Item 20, page 1			
Other unallowable deductions	None		None
Other debits to surplus (to be detailed)			
	None		
TOTAL OF LINES 8 TO 10		None	
ENDING SURPLUS AND UNDIVIDED PROFITS AS SHOWN BY BALANCE SHEET (Line 7 minus line 11)			(2,644.17)

SCHEDULE M—RECONCILIATION OF DEPRECIATION RESERVE

Depreciation reserve as shown by balance sheet at beginning of period	Transferred to Corporation	120.00
Amount of depreciation charged off this year		20.00
Other adjustments (to be detailed)		
Depreciation reserve as shown by balance sheet at end of period (Total of lines 1 to 3)		100.00

SCHEDULE N—RECONCILIATION OF RESERVE FOR BAD DEBTS

Bad debt reserve as shown by balance sheet at beginning of period		
Additions to the reserve during the year		
Other credits (to be detailed)		
TOTAL OF LINES 1 TO 3	CASH BASIS	
Charges against reserve during year		
Other debits (to be detailed)		
TOTAL OF LINES 5 AND 6	CASH BASIS	
Bad debt reserve as shown by balance sheet at end of period (Line 4 minus line 7)		



Item	Amount	Item	Amount
and wages			
and supplies			

SEE SCHEDULE 1

SCHEDULE B—PROFIT OR LOSS FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC.

Kind of Property	2 Date		3 Gross Sales Price	4 Depreciation Allowable Since Acquisition	5 Cost	6 Value as of Jan. 1, 1928	7 Subsequent Improvements	8 Net Profit or Loss (Enter as item 10)
	Acquired	Sold						
			NONE					

If property was acquired

SCHEDULE C—COMPENSATION OF OFFICERS

1 Name of Officer	2 Title	3 Time at Business	4 Shares owned (Cm. Pld)	5 Compensation (Enter as item 14)
P. Lindgren	President	All	50%	3,600.00

SCHEDULE D—COST OF REPAIRS

1 Items	2 Amount (Enter as item 16)
Salaries and wages	
	NONE

SCHEDULE E—TAXES

1 Items (See instruction 16)	2 Amount (Enter as item 18)
SEE SCHEDULE 1	

SCHEDULE F—DIVIDENDS RECEIVED

1 Name of Corporation	2 Amount Received
	NONE

SCHEDULE G—BAD DEBTS

1 Sales on Account	2 Bad Debts

NONE - CASH BASIS

SCHEDULE H—OREGON PERSONAL PROPERTY TAXES PAID

(The tax must actually be paid. No accrual allowed).—See instruction 26

1 Quantity	2 Year of Assessment	3 Date Paid	4 Amount

NONE

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION

1 Kind of Property (Buildings, other materials of which constructed)	2 Date Acquired	3 Acq. when Acquired	4 Probable Life After Acquisition	5 Cost Exclusive of Land	Amount of Depreciation Charged Off	
					6 Previous Years	7 This Year
Garage House	1953	Old	10 Yrs.	200.00	120.00	20.00

If the corporation owns directly or controlled through closely affiliated interests, by a partnership, or by a trustee, 55% or more of the outstanding capital stock of any corporation or of other corporation.

If the corporation owns directly or controlled through closely affiliated interests, by a partnership, or by a trustee, 55% or more of the outstanding capital stock of any corporation or of other corporation.

If the corporation owns directly or controlled through closely affiliated interests, by a partnership, or by a trustee, 55% or more of the outstanding capital stock of any corporation or of other corporation.

If the corporation owns directly or controlled through closely affiliated interests, by a partnership, or by a trustee, 55% or more of the outstanding capital stock of any corporation or of other corporation.

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If the corporation owns directly or controlled through closely affiliated interests, by a partnership, or by a trustee, 55% or more of the outstanding capital stock of any corporation or of other corporation.

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Exhibit No. 29—(Continued)

LINDORF AND COMPANY

1953

SCHEDULE 1Income

Fryer Sales	\$8,344.40
Meat Sales	327.56
Egg Sales	330.10
Sack Sales	<u>145.36</u>
Total	<u>\$9,147.42</u>

Other Deductions

Briquets	\$144.70
Chickens	86.00
Hay	265.00
Electricity	163.35
Calves	52.00
Legal and Accounting	<u>103.06</u>
Total	<u>\$714.11</u>

Taxes

Social Security	\$ 54.00
Corporation	<u>10.00</u>
Total	<u>\$64.00</u>

[Endorsed]: No. 16131. United States Court of Appeals for the Ninth Circuit. Arthur S. Fleming, Secretary of Health, Education and Welfare of the United States, Appellant, vs. Helmer F. Lindgren, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 9, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16131

MARION B. FOLSOM, Secretary of Health, Edu-
cation, and Welfare, Appellant,

vs.

HELMER F. LINDGREN, Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

The points upon which Marion B. Folsom, Secretary of Health, Education, and Welfare, Appellant, will rely on appeal are:

1. The District Court erred in holding in effect that Appellant was required to accept Appellee's characterization of certain exchanges of funds be-

tween the Appellee and a corporation controlled by him, as wages.

2. The District Court erred in holding in effect that Appellant could not look through form to substance in determining whether, in fact, the purported "wages" were remuneration paid for employment, as required by § 209 of the Social Security Act (42 USC 409).

3. The District Court erred in failing to hold that there was substantial evidence in the record to support a finding by Appellant that a large part of the purported "wages" paid to Appellee were, in fact, not remuneration for employment.

4. The District Court erred in denying the motion of defendant Secretary of Health, Education, and Welfare for summary judgment.

5. The District Court erred in entering judgment for Appellee.

Dated at Portland, Oregon, this 8th day of August, 1958.

C. E. LUCKEY,
United States Attorney,
District of Oregon,
/s/ EDWARD J. GEORGEFF,
Assistant U. S. Attorney,
Of Attorneys for Appellant.

Certificate of Mailing Attached.

[Endorsed]: Filed August 9, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF
THE PRINTED RECORD

Marion B. Folsom, Secretary of Health, Education, and Welfare, Appellant, hereby designates for inclusion in the printed record on appeal to the United States Court of Appeals for the Ninth Circuit taken by Notice of Appeal filed July 2, 1958, the following portions of the record, proceedings and evidence in this action:

1. Complaint;
2. Answer;
3. Defendant's Motion for Summary Judgment;
4. Order of Judge East denying defendant's Motion for Summary Judgment;
5. Judgment of Judge East;
6. Notice of Appeal;
7. Referee's Decision, Transcript Pages 5-10;
8. Transcript, Page 26, Lines 3-15;
9. Testimony, Transcript Pages 28-68;
10. Oregon Corporation Excise Tax Return for 1953, Transcript Pages 159-163;
11. Oregon Corporation Excise Tax Return for 1954, Transcript Pages 149-153;
12. United States Corporation Income Tax Return for 1955, Transcript Pages 108-114;

13. Demand Notes that Lindgren held from Corporation, Transcript Pages 136-144;

14. Designation of the Contents of the Printed Record;

15. Statement of Points Upon which Appellant Intends to Rely;

16. Docket Entries.

C. E. LUCKEY,
United States Attorney,
District of Oregon,

/s/ EDWARD J. GEORGEFF,
Assistant U. S. Attorney,
Of Attorneys for Appellant.

Certificate of Mailing Attached.

[Endorsed]: Filed August 9, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

MOTION TO SUBSTITUTE THE SUCCESSOR
OF A PUBLIC OFFICER

Comes now the appellant, Marion B. Folsom, by his counsel, and moves the court for an order substituting Arthur S. Flemming, Secretary of Health, Education and Welfare as appellant herein in place of Marion B. Folsom, Secretary of Health, Education and Welfare, resigned. The basis of the motion is set forth in the attached affidavit of Douglas A. Kahn.

C. E. LUCKEY,

United States Attorney,

District of Oregon,

/s/ EDWARD J. GEORGEFF,

Assistant U. S. Attorney.

/s/ ALAN S. ROSENTHAL,

/s/ DOUGLAS A. KAHN,

Attorneys, Department of Justice. Attorneys for
Appellant.

So Ordered:

/s/ WM. HEALY,

Chief Judge.

/s/ O. D. HAMLIN,

United States Circuit Judge.

Certificate of Mailing Attached.

[Endorsed]: Filed August 28, 1958. Paul P.
O'Brien, Clerk.

No. 16131

In the United States Court of Appeals
for the Ninth Circuit

ARTHUR S. FLEMMING, SECRETARY OF HEALTH,
EDUCATION AND WELFARE, APPELLANT,

v.

HELMER F. LINDGREN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANT

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

ALAN S. ROSENTHAL,
DOUGLAS A. KAHN,
Attorneys,
Department of Justice,
Washington 25, D. C.

FILED

JAN 23 1959



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16131

ARTHUR S. FLEMMING, SECRETARY OF HEALTH,
EDUCATION AND WELFARE, APPELLANT,

v.

HELMER F. LINDGREN, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On June 7, 1957, appellee's claim for old-age insurance benefits was finally denied by the Secretary of Health, Education and Welfare. Appellee instituted this action in the United States District Court for the District of Oregon on July 23, 1957 to obtain review of this denial. (R. 17). The jurisdiction of the district court was invoked under Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g). Judgment was entered against the United States on June 9, 1958 and a notice of appeal was filed July 2, 1958. (R. 18). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

On his 1951 Federal income tax return, appellee, Helmer F. Lindgren, reported self-employment income of \$1,428.46, all of which was derived from farming activities such as the raising and selling of fryers. (R. 22-23). The Social Security Administration determined that appellee was solely engaged in an agricultural enterprise and accordingly advised appellee, in the latter part of 1952, that his earnings were excluded from coverage.¹ (R. 23). Thereupon, appellee consulted his attorneys and inquired of them whether, despite the agricultural nature of his occupation, there was some way in which he could obtain social security coverage. (R. 23, 33-34). Appellee's attorneys informed him that the desired result could be achieved if appellee incorporated his business and then hired himself as an employee. (R. 23, 34).

On his attorney's advice, appellee formed a corporation, Lindgren and Company, on February 2, 1953, and transferred to it assets worth \$2,500.² (R. 23, 62 and Tr. 94). The corporation issued 25 shares of stock. Appellee and his wife took 24 shares and the other share was given to Shirley W. Barker, appellee's stepson, who was a director and vice president of the corporation.³ (R. 23-24). Appellee has been the president of the corporation from its inception, and his wife has

¹ In 1952, earnings derived from self-employment in an agricultural enterprise were excluded under 42 U.S.C. 411 (a) (2); this restriction has been subsequently removed by Act of September 1, 1954, c. 1206, 68 Stat. 1055.

² For reasons of economy, Lindgren and Company took over the articles of incorporation of Snow-Williams Motors, Inc., which was an inactive corporation at that time (R. 23, 58).

³ At that time, Oregon corporation law required that a director be a stockholder. This law was repealed in August of 1953 and Barker then endorsed his share back to appellee and his wife (R. 53-54).

been the secretary and treasurer. (R. 24). The latter, however, never has received any remuneration for her services. (R. 24).

In its incorporated form, the business was operated just as it had been conducted when it was a sole proprietorship. (R. 25). The enterprise engaged in exactly the same pursuits as before. (R. 22-23, Tr. 94). Appellee still operated the business by himself. (R. 25, 34-35). And, by reason of his stock ownership in, and status as president of, the corporation, appellee had complete control over the affairs of the corporation, including its finances and matters of fiscal policy. (R. 23-25, 33).

On February 13, 1953, eleven days after incorporation, there was a meeting of the Board of Directors of Lindgren and Company—*i.e.*, appellee, his wife and stepson. At that meeting appellee proposed that his salary be fixed at \$300 per month (\$3,600 per year)⁴ and that it be paid retroactive to January 1, 1953 (a month prior to incorporation). (R. 24). The Board unanimously adopted this proposal. (Tr. 89). On the same day, appellee loaned \$800 to the corporation. (R. 75-76).

The business, however, did not fare much better in its incorporated form than it had in 1951—when appellee's endeavors had netted less than \$1,500. (R. 22). The result was that the corporation's income (after the payment of all other expenses) was considerably less than appellee's salary of \$3,600 per year. (R. 26.) Rather than reduce appellee's salary to an amount

⁴ It is noteworthy that in 1953 the maximum income that would be credited to an individual's social security insurance coverage was \$3,600 a year, which is the exact amount at which appellee's salary was set. See, 42 U.S.C. 415(a)(1), and 409(a).

which would have been compatible with its financial circumstances, the corporation borrowed an additional \$1,100 from appellee in 1953 (making a total of \$1,900 for that year) and \$1,000 in 1954. (R. 26-27). On at least one occasion, appellee endorsed his salary check back to the corporation and deposited it in the corporation's bank account. (R. 27). While these loans were evidenced by demand promissory notes, in the total amount of \$2,900 and bearing interest at the rate of 2% per annum, the corporation's discharge of the obligation was limited to a single \$600 payment on December 31, 1951. (R. 73-76, 27). The notes were unsecured⁵ and were not repayable at any stated date. (R. 73-76).

The precise financial situation of the corporation is reflected in large measure by the Federal and state corporation tax returns which were filed for the years 1953 and 1954.⁶ (See R. 77-86 and Tr. 154-158, 164-

⁵ Appellee stated that he looked to \$2,500 worth of co-op certificates, which represent rebates on feed and which are held by Lindgren & Co., for the repayment of these loans. (R. 49-50). However, the promissory notes issued to appellee do not state that they are secured by these certificates or any other assets of the corporation. (R. 73-76). Moreover, in 1953 the corporation held only \$550 worth of these certificates, and in 1954 it received only an additional \$320 worth of certificates, so that the highest value of certificates held by the corporation during 1953-1954, the years when the loans were made, was only \$870. (R. 51).

	Income	
	1953	1954
Fryer sales.....	\$ 8,344.40	\$ 7,950.68
Meat sales.....	327.56	643.09
Egg sales.....	330.10	8.53
Sack sales.....	145.36	158.72
Feed rebate.....	556.75	675.57
Interest.....	27.50	43.50
Total.....	\$9,731.67	\$9,480.09

[Footnote 6 continued on page 5]

168). For example, it appears from these returns that, considering appellee's salary as an expense, the business operated during this period at a total loss of approximately \$1,700.

Actually, from one standpoint, the corporation's loss was considerably larger than the tax returns indicate. Neither the 1953 nor the 1954 return makes reference to the rental expense for the farm on which the corporation was doing business. In 1955, it was agreed that \$50 was a fair monthly rental and that sum was thereafter paid. (R. 44-45). Garthe Brown, an attorney for appellee, stated that the rent was not paid in 1953 and 1954 because the corporation did not have sufficient funds at that time, but that \$1,200 rent for those two years is still an outstanding obligation of the corporation. (R. 55-56, 28-29). If the \$1,200 had been included in determining the corporation's losses for 1953 and 1954, the total loss would have amounted to approximately \$2,900—in other words, equal to the amount which appellee loaned the corporation.

Appellee reached the age of 65 on March 31, 1954.

[Footnote 6 continued from page 4]

	Expenses	
	1953	1954
Feed.....	\$ 6,877.73	\$ 6,126.74
Compensation of officers.....	3,600.00	2,925.00
Taxes:		
Social Security.....	54.00	58.00
Corporation.....	10.00	10.00
Depreciation.....	20.00	20.00
Briquets.....	144.70	22.40
Chickens.....	86.00	16.00
Hay.....	265.00	175.68
Electricity.....	163.35	122.76
Calves.....	52.00	39.00
Legal and Accounting.....	103.06	
Total.....	<u>\$11,375.84</u>	<u>\$9,516.08</u>

(R. 21). He filed an application for social security benefits on October 25, 1954, but he later withdrew that application and filed a second application on January 4, 1955. (R. 21.) In September, 1954, immediately prior to the filing of appellee's first application, his salary was reduced from \$300 a month to \$75 a month. (R. 24). Under the Social Security Act as it read at that time, a beneficiary under 75 years of age was not entitled to full social security benefits in any month in which he received wages of more than \$75. See, 42 U.S.C. 403(b)(1).

Effective January, 1955, the Act was amended to permit an individual to earn \$1,200 a year without incurring any loss of benefits. See, 42 U.S.C. (Supp. II) 403(b)(1). In April 1955, appellee's salary was accordingly raised to \$100 a month (*i.e.*, \$1,200 a year). (R. 25).

Both of appellee's applications were based upon his employment with the corporation for the years 1953 and 1954. (R. 21). On October 30, 1956, the Social Security Administration notified appellee that his application was disallowed for the reason that he had only one of the six quarters of coverage that are necessary to be a fully insured individual. (R. 21). Appellee then requested a hearing before a referee. Following the hearing, the referee determined that, except for \$744.84, appellee was not paid "wages" in 1953 and 1954 within the meaning of Section 209 of the Social Security Act, *infra*, pp. 9-10. (R. 29).

The referee concluded that that part of appellee's "salary" which was in excess of the company's earnings for 1953 and 1954, while paid to him in the form of "wages," was, in fact, a return of capital that he had advanced the corporation. (R. 29). He further con-

cluded that, exclusive of the compensation paid appellee, the corporation earned a net profit of \$744.84 in 1953-1954 and consequently that was the amount that the corporation had available with which to pay wages.⁷ (R. 29). In support of his view that, therefore, only \$744.84 represented wages for the purpose of social security coverage, the referee pointed out (R. 30-31):

Where an employee exercises control over a corporation because of stock ownership and his power as a director or officer, transactions between him and the corporate entity require very close scrutiny to distinguish between "wages," on the one hand, and dividends or distribution of corporate assets on the other. Here, the claimant, who was the president and stockholder of a corporation whose

⁷ The referee computed this amount as follows:

	1953	1954
Expense including salary.	\$11,375.84	\$9,516.08
Less salary.	3,600.00	2,925.00
Expense without salary.	7,775.84	6,591.00
Income.	9,731.67	9,480.09
Less Expense without salary.	7,775.84	6,591.08
Net profit before deducting loans and rent.	1,955.83	2,889.01
Less loans by claimant.	1,900.00	1,000.00
	55.83	1,889.01
Less rent.	600.00	600.00
Net profit without salary.	544.17	1,289.01
Net loss in 1953.		544.17
Net profit for 1953 and 1954 available for salary.		744.84

stock was owned exclusively by himself and his wife, advanced money to it when necessary and withdrew funds from the corporation at irregular intervals and in irregular amounts as funds were available and in accordance with his personal needs. The referee has noted above that initially the claimant's salary was set at the exact maximum creditable for social security purposes, and that subsequently changes in salary were made for no apparent reason except to permit continuous benefit payments without deductions because of wages or earnings in excess of the statutorily-permitted amounts. Although the referee assumes good faith on the part of the claimant, he regards the case of *Gancher v. Hobby*, 145 F. Supp. 461 (D. Conn. 1955) as of precedent value in the disposition of the instant claim.

Also, the referee noted a certain looseness in the financial relationship between Lindgren and the corporation in that whenever Lindgren needed money he would take it from the corporate funds as an "advance" on his wages, and he would repay these advances upon receiving his salary. (R. 27-28). The district court, citing *MacPherson v. Ewing*, 107 F. Supp. 666 (N.D. Cal.), held that the referee's decision "must be considered, in law, to be arbitrary and capricious." (R. 10-12). Accordingly, the court denied the Government's motion for summary judgment and on June 8, 1958, entered judgment for appellee, allowing his claim for old-age insurance benefits. (R. 14-15).

STATUTES INVOLVED

The pertinent sections of the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. 401 *et seq.*, provide:

§ 202. [42 U.S.C. 402] *Old-age and survivors benefit payments—insurance benefits.*

Every individual who—

(a) is a fully insured individual (as defined in section 414(a) of this title) * * * shall be entitled to an old-age insurance benefit for each month * * * such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

§ 205(g). [42 U.S.C. 405(g)]. *Review.*

Any individual, after any final decision of the Administrator⁸ made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action * * *. As part of its answer the Administrator shall file a certified copy of the transcript of the record, including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a rehearing. The findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive * * *.

§ 209. [42 U.S.C. 409]. *Definition of wages.*

For the purposes of this subchapter, the term "wages" means * * * a remuneration paid after 1950 for employment * * * except that in the case

⁸ Under Reorganization Plan No. 1 of 1953 the office of Federal Security Administrator was abolished and all functions of the Administrator were transferred to the Secretary of Health, Education and Welfare.

of remuneration paid after 1950, such term shall not include—

(a) That part of the remuneration which after remuneration * * * equal to \$3,600 with respect to employment has been paid to an individual during any calendar year, is paid to such individual during such calendar year.

§ 214. [42 U.S.C. 414]. *Insured status for purpose of old-age and survivors insurance benefits.*

For the purposes of this subchapter—

(a) *Fully insured individual.*

(2) In the case of any individual who did not die prior to September 1, 1950, the term “fully insured individual” means any individual who had not less than—

(A) one quarter of coverage * * * for each two of the quarters elapsing after 1950, or after the quarter in which he attained the age of twenty-one, whichever is later * * * except that in no case shall an individual be a fully insured individual unless he has at least six quarters of coverage * * *.

§ 215.⁹ [42 U.S.C. 415]. *Computation of primary insurance amount.*

For the purposes of this subchapter—

(a) *Primary insurance amount.*

(1) The primary insurance amount of an individual * * * with respect to whom not less than six of the quarters elapsing after 1950 are quarters of coverage shall be 55 per centum of

⁹The amendment to Section 415, found in 42 U.S.C. (Supp. II), 415 does not apply to appellee.

the first \$100 of his average monthly wage plus 15 per centum of the next \$200 of such wage * * *

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in holding in effect that the Secretary was required to accept appellee's characterization of certain exchanges of funds, between the appellee and a corporation controlled by him, as wages.

2. The district court erred in holding in effect that the Secretary could not look through form to substance in determining whether, in fact, the purported "wages" were remuneration paid for employment, as required by § 209 of the Social Security Act (42 U.S.C. 409).

3. The district court erred in failing to hold that there was substantial evidence in the record to support a finding by the Secretary that a large part of the purported "wages" paid to appellee was, in fact, not remuneration for employment.

4. The district court erred in denying the action of the Secretary for summary judgment.

5. The district court erred in entering judgment for appellee.

SUMMARY OF ARGUMENT

The district court erred in holding in effect that the Secretary was obligated to accept appellee's formal characterization of the transfer of funds between him and a corporation solely controlled by him as "wages." To the contrary, the Secretary was entitled to scrutinize the transactions in order to determine whether they were, in fact, remuneration for services rendered. In the instant action, the Secretary examined the circumstances surrounding the payment of appellee's "salary" and found that a large part of the purported salary

was merely a return of capital and advancements and, therefore, did not qualify as "wages" under the Social Security Act. The record lends ample and convincing support to this finding.

ARGUMENT

I

The Secretary Is Not Required to Accept Appellee's Characterization of the Transfer of Funds Between Appellee and a Corporation Controlled by Him as Wages

In reversing the determination of the Secretary, the court below apparently proceeded on the assumption that, if a bona fide employment relationship existed, no inquiry could be made by the Secretary into whether the purported wages were, in fact, remuneration for services performed. Since the referee had found such a relationship to exist between appellee and the company which was wholly controlled by appellee, the court therefore concluded that it was irrelevant whether the "salary" which appellee had established for himself was, in whole or in part, a sham.

If the district court were correct in this assumption, an individual could obtain full social security insurance benefits for a negligible sum by the simple expedient of establishing a corporation one year and one-half (six quarterly periods) before he becomes eligible for benefits, hiring himself as an employee and loaning the corporation a sufficient amount of money to pay him a "salary". *Kossmann v. Folsom*, 157 F. Supp. 157, 158 (E.D. N.Y.), severely criticized a legal theory which would permit such easy access to a lifetime annuity from Government funds. Clearly, Congress could not have intended that the Social Security Act should be so abused.

The prior judicial decisions in this area lend no sup-

port to the theory of the court below that form must be given precedence over substance insofar as the administration of the Social Security Act is concerned. It is well settled that the Secretary may disallow purported wages paid to a claimant, on the ground that there was no bona fide employment relationship existing between the recipient and the payor of the putative salary. See *e.g.*, *United States v. Lalone*, 152 F. 2d 43 (C.A. 9); *McGrew v. Hobby*, 129 F. Supp. 627 (D. Kan.); *Thurston v. Hobby*, 133 F. Supp. 205 (W.D. Mo.); and *Murray v. Folsom*, 147 F. Supp. 298 (D. D.C.). *A fortiori*, the Secretary may examine the validity of the purported wages, itself, to determine whether they were actually paid as remuneration. Directly in point is *Gancher v. Hobby*, 145 F. Supp. 461 (D. Conn.), upon which the referee relied (R. 31).

In the *Gancher* case, the claimant was a doctor and therefore his self-employed income was excluded from coverage under the Social Security Act. The claimant organized a corporation with his wife, daughter and himself as the corporate officers, and then transferred a building to the corporation. The building contained the claimant's business office and three apartments. The claimant was paid \$300 a month as "wages" for collecting the rent for the three apartments and the office. The district court held that the payments made to the claimant were not "wages" within the Act, but were part of a "slick scheme" engineered for the purpose of improperly acquiring contributions for the claimant's support from the Social Security Administration.¹⁰ The court then held (145 F. Supp. at 463) :

¹⁰ It is significant that in its holding the district court noted that the salary paid to claimant, as was the salary paid to appellee in the instant action, was the exact amount that was necessary to obtain maximum coverage under the Act. 145 F. Supp. at 463.

There is nothing improper or questionable about a person entering a bona fide employment for the express purpose of acquiring a wage record which will enable him to qualify for an old-age insurance benefit. Such action is clearly within the spirit as well as the letter of the law. However, it is a far different thing to create a relationship and *give to certain payments the color of "wages" for the purpose of qualifying under a law such as the one here in question. That is neither within the letter nor the spirit of the law.* [Emphasis added.]

MacPherson v. Ewing, 107 F. Supp. 666 (N.D. Cal.), upon which the district court relied in the instant action, is clearly distinguishable. In *MacPherson*, the Federal Security Administrator¹¹ disallowed eight monthly payments of \$300 made to the insured while he was ill on the ground that these payments were made out of generosity and were not "wages" within the Act. The district court reversed on the ground that, absent any fraud or deceit, the motive of the employer is immaterial.

What the court below here ignored, however, is that in *MacPherson* the employer and employee were strangers who were dealing with each other, at arm's length; while in the present action, the payments were made between a corporation, which was controlled by the claimant, and the claimant himself. All that *MacPherson* holds is that, when there is a valid employer-employee relationship between two parties who were dealing with each other at arm's length, the Secretary

¹¹ The functions of the office of Federal Security Administrator were transferred to the Secretary of Health, Education and Welfare in 1953. See p. 9, n. 8, *supra*.

cannot exclude the wages paid either because of the motive of the employer or because the value of the services rendered was inadequate to support the salary given. The court's reasoning presumably was that any other result might well place too great a burden upon a claimant as he would not only have to establish that wages were paid to him, but also that they were deserved.

MacPherson cannot possibly be made to stand for the proposition that, where the claimant is an employee of a corporation that he controls, the transactions between the two parties may not be carefully scrutinized in order to determine whether there existed more than mere bookkeeping entries motivated by the coverage requirements of the Social Security Act. Cf. *Wilshire & Western Sandwiches, Inc. v. Commissioner*, 175 F. 2d 718, 721 (C.A. 9). Although denominated a separate legal entity, a corporation which is controlled by one employee is essentially the alter ego of that employee, who is therefore in a position to obtain social security insurance benefits by merely attaching a label to certain transfers of property that are in actuality transactions with himself. Consequently, the fact that in the instant action the parties labelled certain transfers of money to the appellee as "wages" is not conclusive upon the Secretary, who may disregard the form of such payments and treat them as what they actually are, *viz.*, a return of capital and advancements. *Gancher v. Hobby*, *supra*. Cf. *Higgins v. Smith*, 308 U.S. 473, 477.

While the Supreme Court has not had occasion to pass upon the question in its present context, it is to be noted that that Court has indicated that the Secretary has the power to disallow certain payments, as not being "wages" within the Act. In *Social Security Board v.*

Nierotko, 327 U.S. 358, the Social Security Board has refused to treat "back pay," which the claimant had received from his employer by virtue of an order of the National Labor Relations Board, as "wages" under the Social Security Act. Noting that the Social Security Board had based its decision upon its interpretation of the statute involved¹² and not upon a finding of fact or any conclusion drawn therefrom, the Court held that the Board's interpretation was incorrect as a matter of law. It went on, however, to observe that (327 U.S. at 369):

Congress used a well understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. *There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.* [Emphasis added.]

While the Court was referring to the finality of the administrative decision there, it is implicit from this observation that not every payment to an employee constitutes "wages", and that the Secretary is free to make a determination on that issue where, as in the instant action, there are factual considerations present.

II

The Record Fully Supports the Secretary's Determination That a Large Part of the Sums Transferred from Lindgren & Co. to Appellee Was Not Remuneration for Services Rendered, But Was, in Fact, a Return of Capital

42 U.S.C. 405(g) provides that the findings of the Secretary "as to any fact, if supported by substantial

¹² Now, 42 U.S.C. 409.

evidence, shall be conclusive.” It is well settled that a court may not substitute its judgment for that of the Secretary of Health, Education and Welfare, and that the conclusions and inferences which the Secretary has drawn from its findings are equally conclusive upon the court. See *e.g.*, *Gray v. Powell*, 314 U.S. 402, 412; *United States v. Lalone*, 152 F. 2d 43 (C.A. 9); and *Walker v. Altmeyer*, 137 F. 2d 531 (C.A. 2).

The record lends convincing support to the Secretary's determination that a substantial part of the \$300 per month “salary,” paid to appellee, was not remuneration for services rendered, but, to the contrary, was a return of capital and advancements, previously made to the corporation by appellee, and which had been denominated as “wages” by appellee for the purpose of establishing a wage record which would give him maximum insurance benefits.

1. After appellee learned in 1952 that his income was excluded from coverage, he and his attorneys designed and executed a scheme whereby appellee would incorporate his business and then hire himself as an employee (R. 23, 33-34). Lindgren & Co., the corporation which was created by appellee and by which he was employed, was under the complete control of appellee, who served as its president (R. 23-25). Although the corporation was not created until February 2, 1953 (Tr. 94), appellee decided that his salary should be paid retroactive to January 1, 1953 (R. 24). Appellee further decided that this salary should be in the amount of \$300 a month; in other words, exactly the maximum amount of income that could be credited to an individual's social security coverage under the then provisions of the Social Security Act. See 42 U.S.C. 409(a), 415(a)(1). Insofar as the record shows, in arriving at

the salary which the corporation was to pay appellee, no consideration was given to the reasonable expectations of the newly incorporated enterprise or to the fact that, when operated as a sole proprietorship, appellee's income from his endeavors was substantially less than \$300 a month.

Any doubt as to the factors which determined appellee's salary is totally dispelled by the fact that, as soon as appellee had received the \$300 monthly salary for a sufficient period of time to entitle him to full social security benefits, his salary was promptly reduced to \$75 a month (R. 24), which was the maximum amount that an individual could earn without incurring any deductions from his monthly insurance payments. See, 42 U.S.C. 403(b)(1). Then, when the Social Security Act was amended in 1954, effective as of January, 1955, to allow an individual to earn \$1,200 a year without losing any benefits,¹³ appellee raised his salary to precisely that figure (R. 25).

In short, it is clear—and, indeed, appellee himself concedes (R. 62)—that Lindgren & Company was formed for the sole purpose of providing appellee with a wage record so that he could obtain social security benefits. Appellee's salary was established, not in accordance with the value of his services, but solely to conform with the prerequisites of the Social Security Act. When the requirements of the Act changed, appellee's salary was correspondingly changed with it.

2. As noted above, appellee himself had earned only \$1,428 from his business in 1951 (see R. 22). As might well have been expected, since appellee continued to operate the business as a sole proprietorship, the earnings of the business were not appreciably increased

¹³ See 42 U.S.C. (Supp. II) 403(b)(1).

after its incorporation. However valuable appellee's services were, they could not have been of greater value to the corporation than was its expected income exclusive of salaries.

Appellee, himself, of course, recognized that his \$3,600 a year salary could not be made out of the corporation's gross receipts. Accordingly, he decided to "loan" the corporation a sufficient amount to cover the difference between the corporate earnings and his salary.¹⁴ In effect, then, Lindgren received his "wages" from the corporation and then put them back into the company's account (R. 43). As noted above, however, as soon as he had obtained social security coverage, Lindgren reduced his salary to \$75 a month because, as he stated, the corporation was losing money and could not afford to pay him the salary he had been receiving (R. 46).

In sum, it is clear that a considerable part of appellee's "salary" was nothing more than a bookkeeping device by which appellee was attempting to "pad" his actual income, in order to obtain a lifetime annuity from the Government.

III

Since the Court Below Did Not Pass Upon the Question as to the Correctness of the Secretary's Accounting, the Cause Should Be Remanded for That Purpose

It is clear from the foregoing that the district court's erroneous belief that the Secretary could not look

¹⁴ Exclusive of appellee's salary, the corporation earned \$3,644.84 in 1953 and 1954 (this figure is obtained by adding the \$1,200 rent owed by the corporation for 1953-1954 to the expenses listed in the corporate tax returns for those years), which is approximately \$2,900 less than the \$6,525 which was paid to Lindgren as "salary." Lindgren loaned the corporation \$2,900 during that same period (R. 26-27).

behind the characterization as “wages” of the sums transferred to appellee was critical to its disposition of the case. As we have seen, even a cursory examination of the record before the Secretary dispels all possible doubt that, at least to some extent, the purported “salary” payments were purely fictitious.

In the court below, appellee did not restrict himself to the argument that the Secretary was prohibited from inquiring into whether the sums paid by the corporation to appellee were, in reality, salary payments. He also argued that, assuming such inquiry could be made, the Secretary made certain accounting errors in determining what portion of the payments actually represented salary.

The district court, in its mistaken view of the governing legal principles, did not reach that issue. In these circumstances, we believe that the appropriate disposition of the case would be a remand to the district court with instructions to consider the issue in the proper judicial prospective—*viz.*, that the Secretary may scrutinize transactions between a corporation and its employee who maintains sole control over said corporation and determine whether, and to what extent, the purported salary paid to such employee was “remuneration” so as to comply with the definition of “wages” set forth in Section 209 of the Social Security Act. See pp. 9-10 *supra*.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded for further proceedings.

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JANUARY, 1959.

United States
COURT OF APPEALS
for the Ninth Circuit

ARTHUR S. FLEMMING, Secretary of Health, Education and Welfare,

Appellant,

v.

HELMER F. LINDGREN,

Appellee.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

BRIEF FOR THE APPELLEE

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United States
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Appellant,

v.

HELMER F. LINDGREN,

Appellee.

On Appeal from the Judgment of the United States District Court for the District of Oregon.

BRIEF FOR THE APPELLEE

JURISDICTION

On June 7, 1957, appellee's claim for old-age insurance benefits was finally denied by the Secretary of Health, Education and Welfare. Appellee instituted this action in the United States District Court for the District of Oregon on July 23, 1957 to obtain review of this denial (R. 17). The jurisdiction of the district court was invoked under Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g). Judgment was entered against the United States on June 9, 1958 and a notice of appeal was filed July 2, 1958 (R. 18). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

The facts in the instant case are fairly clear. Prior to 1953, the appellee operated a farm for many years, raising fryers. Upon inquiry concerning social security benefits, the appellee was told that his business was excluded from coverage under the Social Security Act, but he could be covered if he was an employee of a corporation. Upon this advice, appellee consulted with his attorney and his business was incorporated and he became an employee of the corporation, Lindgren and Company. The appellee freely stated that the purpose for incorporating was to obtain coverage under the Social Security Act (R. 34).

After formation, the corporation operated the business of raising fryers and hired the appellee as an employee who performed practically all of the work of the corporation (R. 35, 36). The corporation paid appellee for his services the sum of \$3,600.00 in 1953 and \$2,925.00 in 1954, which said sums appellee received and reported on his personal federal income tax returns for said years as income and paid income taxes thereon (R. 48, 54). Due to the unstable market conditions in the poultry business, thereby causing the corporation to lose \$1,644.17 in 1953 and \$35.99 in 1954, the appellee's salary was reduced in the latter part of 1954 (R. 46).

From the time of its incorporation, the funds of the corporation were kept entirely separate from the appellee's and the bank account of the corporation was used

exclusively for company business (R. 28). Like many other employees paid on a monthly basis, appellee sometimes received an advance on his salary which was subsequently repaid when he received his pay check at the end of the month (R. 27, 28). There is no question that appellee was a bona fide employee of the corporation during the years 1953 and 1954. As stated by the referee in his decision (R. 22):

“ . . . It is unquestioned here that as an officer of Lindgren and Company, commencing in February, 1953, the claimant was in an employment relationship, within the meaning of section 210 of the Social Security Act, and, specifically, section 210 (k)(1).”

Thus, the only question involved is whether the sums of \$3,600.00 and \$2,925.00 paid to appellee as wages during the years 1953 and 1954 constituted “wages” subject to the Social Security Act. The Department of Health, Education and Welfare, in denying appellee’s claim for old-age insurance benefits, stated that “the alleged wages represented repayment of funds which you had advanced to the corp.; and after repayment of such advances the corp. did not show sufficient profit to support a finding of wages paid except for \$744.84 for the first quarter of 1954.” Said determination was upheld by the referee who referred again to the lack of profits after allowance for repayment of advances as the basis for his decision (R. 29). The appellant then adopted the decision of the referee as his final decision.

In the first two years of the corporation, loans were made by appellee to the corporation in the sum

of \$1,900.00 in 1953 and \$1,000.00 in 1954 (Exhs. 25, 26, 27, 28, Tr. 136-143). Of these loans, \$600.00 was actually repaid as of December 31, 1955 (R. 27, 76). There is still owing on said notes the sum of \$2,300.00. No other loans were made after 1954 (R. 48). The appellee looks to the Oregon Egg Producer Cooperative Certificates owned by the corporation for the repayment of his loans (R. 49, 50). Said certificates have a total market value of \$2,590.00 (R. 51).

Apparently, it is the contention of the appellant that before remuneration actually paid an employee can constitute "wages" under Section 209 of the Social Security Act, the employer must show sufficient profit to pay such wages, and in determining said profit, all loans made by the said employee to the employer must first be repaid, and all rent accrued, paid (R. 29).

STATUTES INVOLVED

The pertinent sections of the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. 401 *et seq.*, provide: Section 202. [42 U.S.C. 402] *Old-age and survivors benefit payments—insurance benefits.*

Every individual who—

(a) is a fully insured individual (as defined in section 414(a) of this title) * * * shall be entitled to an old-age insurance benefit for each month * * * such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

Section 205(g) [42 U.S.C. 405(g)]. *Review.*

Any individual, after any final decision of the Administrator made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action * * *. As part of its answer the Administrator shall file a certified copy of the transcript of the record, including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of record, a judgment affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a rehearing. The findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive * * *.

Section 209. [42 U.S.C. 409]. *Definition of wages.*

For the purposes of this subchapter, the term "wages" means * * * a remuneration paid after 1950 for employment * * * except that in the case of remuneration paid after 1950, such term shall not include—

(a) That part of the remuneration which after remuneration * * * equal to \$3,600 with respect to employment has been paid to an individual during any calendar year, is paid to such individual during such calendar year.

SUMMARY OF ARGUMENT

Although the appellant is entitled to scrutinize the relationship between employer-employee, and further, to ascertain whether remuneration paid the employee is actually "wages" for services rendered, still he cannot

arbitrarily and capriciously determine that remuneration paid an employee does not qualify as "wages" under the Social Security Act merely because the employer may have lost money in the year said remuneration was paid. No such statutory power has been conferred upon him. Therefore, the district court did not err in holding that the appellant erroneously applied the law to the facts in the instant case by arbitrarily and capriciously denying the appellee's claim for social security benefits.

I.

The district court did not err in holding that the appellant cannot arbitrarily and capriciously disallow wages paid by an employer to a bona fide employee.

Contrary to the contentions of the appellant in his brief, the district court did not hold, in reversing appellant's denial of appellee's claim for social security benefits, that the appellant cannot inquire into whether purported wages paid an employee were actually remuneration for services performed. What the district court did hold was that the appellant cannot arbitrarily and capriciously disallow "wages" paid to a bona-fide employee for services rendered merely because the employer is a closely-held corporation which did not make "sufficient profit" during the years in which the wages were paid (R. 11).

The Social Security Act defines the term wages as "remuneration paid . . . for employment . . ." (42 U.S.C. 409). In the instant case before the court, it is not disputed that there was a bona fide employment rela-

tionship between the appellee and his employer, Lindgren & Company, during the years in question, 1953 and 1954. The referee so found in his decision (R. 22). Although the appellee incorporated his poultry business for the purpose of entering to such employment relationship so as to be covered by the Social Security Act, the Referee freely admitted "There is nothing improper in that" (R. 62). Furthermore, the district court found the record absolutely devoid of any fraud or deceit on the part of the appellant (R. 11). In the case of *Gancher v. Hobby*, 145 F. Supp. 461 (1955), the District Court for the District of Connecticut quoted the following language of the Referee:

" . . . There is nothing improper or questionable about a person entering bona fide employment for the express purpose of acquiring a wage record which will enable him to qualify for an old-age insurance benefit"

The Court of Appeals for the Seventh Circuit, in *Rhoads v. Folsom*, 252 F. 2d 377 (1958), reached a similar conclusion in stating:

"It may be true that the arrangement by which Mr. and Mrs. Rhoads were each to be paid was for the purpose of bringing them within the coverage of the Social Security Act. Even so, we see no legal impropriety in their so doing if in fact they both rendered services for which they were paid in accordance with an agreement"

The *Gancher* case was cited by the referee in his decision "as of precedent value in the disposition of the instant claim" of the appellee (R. 31), and the appellant relies heavily upon it to support his contentions. However, a mere reading of that case shows the following distinguishing points not found in the instant case.

First, in the *Gancher* case, the referee and the court rightly concluded that the claimant failed to establish any valid employment relationship. The claimant was a physician who became an officer of the corporation which he alleged to be his employer. However, he actually performed no services for the corporation other than to collect rent from himself and relatives who were tenants of the building owned by the corporation. As stated by the referee in his findings, and quoted by the court:

“ . . . The picture of the claimant, as an individual, making rental payments to himself as an officer of the corporation and then, in turn, paying himself for his ‘services’ to the corporation approaches the farcial.”

Such is clearly distinguishable from the facts of the instant case where the appellee, besides being an officer of his corporate employer, was the only employee of said corporation and as such, worked long and laborious hours in raising fryers and other poultry for sale. The appellee, unlike the claimant-physician in the *Gancher* case, has no other profession or source of income for his livelihood. Surely it cannot be said that \$300.00 a month is an excessive wage for the full-time services rendered by the appellee herein.

Secondly, it was pointed out in the *Gancher* case that the only income of the alleged corporate employer was rent received from the claimant-physician and his relatives, as stated above. But in the instant case, the income of appellee's corporate employer was practically all from the sale of fryers and allied farm products

(R. 25), the very business of the employer. Such income could not have been received by the corporate employer were it not for the services performed by the appellee employee.

Third, the evidence in the *Gancher* case showed the alleged corporate employer had a life of less than two years, and the claimant-physician received wages only during the minimum period of six quarters necessary for social security coverage. In fact, the referee in his decision, stated that evidence indicated that the claimant actually received the purported salary payments in only three calendar quarters during the existence of the corporation. In contrast, the corporation in this case was over four years old at the time of the hearing before the referee on April 3, 1957, and was still operating the fryer business. Also, the appellee herein actually received from his employer wages for his services during this whole period. These wages were in fact paid to appellee in cash (R. 48) and were not "mere bookkeeping entries" as suggested by appellant. Thus, the *Gancher* case is entirely distinguishable from the instant case.

Since the appellee herein was a bona fide employee under the Social Security Act and actually received remuneration for his services, the only grounds given by the referee for denying the appellee's claim for old-age benefits was that "the corporation did not show sufficient profit to support a finding by the referee that the alleged remuneration constituted 'wages'." (R. 29). The inference logically follows that if the corporate employer, Lindgren and Company, had shown sufficient profits in the years involved herein, the claim of the appellee

would not have been denied. It is unquestioned that this poultry business had been operated for many years for the purpose of making a profit, but it was only due to the economic slump in this field of farming that caused the losses incurred by Lindgren and Company in 1953 and 1954. Actually the loss in 1954 was only \$35.99 after the payment of wages to appellee in the amount of \$2,925.00 (R. 77).

In order to support his conclusion, the referee adjusted the profit and loss statements of the employer to allow for repayment of loans and payment of reasonable rent, and further offset the resulting loss of one year against the other. In other words, it is the contention of the referee and appellant that the employer in this case must first repay his loans and also pay a reasonable rent for the farm owned by the appellee before it could pay remuneration to the appellee employee for his services.

Neither the referee in his decision nor the appellant in his brief has cited any law, regulation, or court decision to the effect that an employer must show a "sufficient profit" after repayment of all loans and expenses before it can pay an employee wages for his services. Appellee, in his research of the law and the cases decided thereunder, also could find no such rule.

On the other hand, in the somewhat analogous case of *MacPherson v. Ewing*, 107 F. Supp. 666 (1952), where the Social Security Administrator denied the employee's widow's claim for benefits due to the motives of the employer or the effectiveness or adequacy of the

employee's services or labor, the court, in holding for the widow, said:

"Whatever may have been the motives of the employer, whether prompted by generosity or selfishness, they are immaterial in determining the nature of the payments. The record, without dispute, shows that the relation of the employer and employee existed. To permit the administrator to rest his decision upon the *motives* of the employer or upon the *effectiveness* or *adequacy* of the employee's services or labor, absent any element of fraud or deceit, would be to entrust to him a power far beyond that statutorily conferred upon him.

"Upon the record, therefore, the decision of the administrator must be considered, in law, to be arbitrary and capricious."

To paraphrase the language of the court above, to permit the appellant in the instant case to disallow the claim of the appellee upon the financial condition of his employer, after making certain adjustments to the profits and losses of the employer for the years involved, would be to entrust him with powers far beyond that statutorily conferred upon him. Such action of the appellant is certainly arbitrary and capricious. If allowed to stand, every employee receiving remuneration for services rendered an employer which shows a loss instead of a profit would not be considered to have received "wages" under the Social Security Act, at least insofar as closely-held corporations are concerned.

Further, the referee was in obvious error in holding that the corporate employer did not show sufficient profit to support the payment of wages to the appellee. The very Federal Income Tax returns of the employer

show losses of only \$1,644.17 and \$45.99 in 1953 and 1954 respectively, which losses were determined after the deduction of the wages paid to the appellee in those years in the amounts of \$3,600.00 and \$2,925.00 (R. 26). The referee erroneously assumed that in computing a profit or loss of a business, you must deduct the amount borrowed by the business. Such loans are liabilities of a business, but the repayment thereof does not constitute an expense of the business in the determination of profits or losses.

As stated by the appellee at the hearing, the loans by the appellee to the corporate employer in the total sum of \$2,900.00 were not repaid during the years 1953 and 1954, but \$600.00 was repaid December 31, 1953 (R. 27, 76). The appellee holds notes for the balance of \$2,300.00 and looks to the cooperative patronage certificates owned by the corporate employer for the repayment of these notes (R. 49). Said certificates have a value of \$2,500.00 (R. 50) and can be cashed in at any time. They draw 5 per cent interest (R. 52). Thus, the finding of the referee that the remuneration paid to the appellee during the years involved represented repayment of funds loaned to the corporate employer is arbitrary and capricious and not based upon fact. This is not the situation of an employer receiving no other funds with which to pay wages other than amounts borrowed from its employees, for in the instant case the employer was operating a going business from which it received \$9,731.67 and \$9,480.09 in gross sales during the years 1953 and 1954 respectively, whereas the loans amounts to only \$1,900.00 and

\$1,000.00 in those respective years. It is not uncommon for an employee-stockholder of a small corporation to loan money to his corporation when the needs of the business demand it.

II.

The district court has the power and duty to determine whether the appellant has correctly applied the law to the facts.

It is not disputed that Section 205(g) of the Social Security Act provides that the findings of the referee (as adopted by the Secretary) as to any fact shall be conclusive, if supported by substantial evidence. However, it is not the findings of fact of the referee which the appellee disputes in this case, but rather, the inference and conclusions of law drawn by the referee from those facts. It is true that the same finality as to findings of fact extends to the inferences and conclusions drawn from the facts, but only if there is a substantial basis for them. This is clearly stated by the court in the very case cited by the appellant in his brief; namely, *United States and Social Security Board v. LaLone*, 152 F. 2d 43 (9th Cir., 1945):

“ . . . This same finality extends to the Board's inference and conclusions from the evidence *if a substantial basis* is found for them . . .” (Emphasis added).

However, where the basis upon which the referee rests his inference and conclusions of law are faulty, arbitrary and capricious, as in the instant case, it is within the province of the District Court to reverse

the decision of the referee (Secretary). (See *MacPherson v. Ewing*, *supra*). The Federal District Court is still the final authority in determining whether the referee has correctly applied the law to the facts, *Aubrey v. Folsom*, 151 F. Supp. 836 (1957), *Ayers v. Hobby*, 123 F. Supp. 115 (1954), and in reviewing the decision of the referee, said court must not abdicate its conventional judicial function. *Fuller v. Folsom*, 155 F. Supp. 348 (1957). As stated in *Miller v. Burger*, 161 F. 2d 992 (CA 9, 1947):

“... The argument is that this conclusion (of the Board) is not ‘manifestly unreasonable’ and must be sustained. This is on the theory that where an administrative agency is charged with applying general statutory language to a concrete factual situation, the courts will not disturb the conclusion reached.

“... Here we are not forced to consider a holding of the lower court which, in effect, substitutes the judgment of that court, on a set of facts for the judgment of the Board thereon. The lower court did not reach a decision contrary to the facts found by the Appeals Council. We believe that the ultimate question presented to the lower court was one of law.”

A review of the decision of the referee in the instant case clearly shows that the only basis for the referee's conclusion that the appellee did not receive sufficient wages from his employer in 1953 and 1954 was that his corporate employer “did not show sufficient profit.” Such is not a valid basis for the conclusion, much less a *substantial* basis. Furthermore, even in determining the amount of profit earned by the appellee's employer in the years involved, the referee and appellant made

certain arbitrary and capricious adjustments to the amounts shown on the employer's books and tax returns for said years, which said adjustments have no basis whatsoever under any accounting principles or the general rules of law applicable thereto.

CONCLUSION

The lower court in the instant case, after reviewing the entire record, found that the decision of the appellant in denying the claim of the appellee for social security benefits was due to an erroneous application of the law to the facts, and therefore must be considered, in law, to be arbitrary and capricious (R. 14). As stated by this court in *Folsom v. Pearsall*, 245 F. 2d 562 (CA 9, 1957), in affirming the lower court's reversal of the Secretary, the "conclusions of law drawn by the district court are entitled to great consideration, though not conclusive." The judgment of the lower court in favor of the appellee should be affirmed.

Respectfully submitted,

EUGENE E. FELTZ,
Of Attorneys for
Helmer F. Lindgren, Appellee.

JACOB, JONES & BROWN,
623 Public Service Building,
Portland, Oregon.

No. 16132 ✓

*See also
Vol. 3095*

United States
Court of Appeals
for the Ninth Circuit

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW, Appellants,

vs.

CABOT SHOPS, INC., and HOWARD SUPPLY
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CABOT SHOPS, INC., and HOWARD SUPPLY
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vs.

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Transcript of Record

In Three Volumes

VOLUME I.

(Pages 1 to 320, inclusive)

Appeals from the United States District Court for the
Southern District of California,
Central Division

FILED

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In The United States District Court, Southern
District of California, Central Division

Civil No. 289-57 WM

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW, Plaintiffs,

vs.

CABOT SHOPS, INC., a corporation, and CABOT
SHOPS, INC., dba Franks Manufacturing
Company, HOWARD SUPPLY COMPANY,
a corporation, Defendants.

COMPLAINT—INFRINGEMENT OF PATENT
NO. 2,671,537 AND FOR INJUNCTION

I.

This Court has jurisdiction of the herein action under the Patent Laws of the United States, under Title 28 U.S.C.A. Sec. 1338(a).

James Moon, Edmond M. Wagner and Philip Subkow are citizens of the State of California, and reside within the Southern District of California, Central Division.

Cabot Shops, Inc. is a Massachusetts corporation, having an established and regular place of business in, and is licensed to, and is doing business in the Southern District of California, Central Division.

Howard Supply Co. is a California corporation and has a regular and established place of business

in the Southern [2] District of California, Central Division.

II.

On March 9, 1954, United States Letters Patent No. 2,671,537 was duly and legally issued to Western Oil Tool and Engineering Co., Inc., a California corporation, as assignee of James Moon, and that by an instrument in writing, dated February 25, 1955, said patent was assigned by Western Oil Tool and Engineering Co., Inc., jointly to James Moon and Edmond M. Wagner, and that by instruments in writing, dated March 2, 1955 and January 25, 1957, said James Moon and Edmond M. Wagner did assign to Philip Subkow an undivided one-third interest in and to said Letters Patent, and that said James Moon, Edmond M. Wagner and Philip Subkow have been and are still jointly the owners of those Letters Patent.

III.

Defendants have for a long time past and still are wilfully infringing those Letters Patent by making and by selling and using within the Southern District of California, and elsewhere, the Derrick Mounting for Portable Drilling and Servicing Rigs embodying the patented invention and will continue to do so unless enjoined by this Court.

That defendants Cabot Shops, Inc. have induced and joined with defendant Howard Supply Company and others to infringe said Letters Patent by selling and using or using the said Derrick Mounting for Drilling and Portable Rigs [3] embodying

the patented invention within the Southern District of California, and elsewhere.

IV.

Plaintiffs have notified Defendants of their said infringement and have given written notice of said infringement to defendant Cabot Shops, Inc.

Wherefore, plaintiffs demand a preliminary injunction against further infringement by defendants and those controlled by said defendant, or any of them, an accounting for profits and damages and an assessment of costs, including plaintiffs' attorney's fees, against defendants, and such other or additional relief as may seem meet and just to this Court.

/s/ PHILIP SUBKOW,

Attorney for Plaintiffs James
Moon, Edmond M. Wagner.

/s/ PHILIP SUBKOW,

In propria persona. [4]

Duly Verified. [5]

[Endorsed]: Filed February 27, 1957.

[Title of District Court and Cause.]

ANSWER

The defendants, Cabot Shops, Inc. and Howard Supply Company, for their answer to the complaint herein say:

1. Defendants admit the allegations of paragraph

1 of the complaint, except in so far as reference is made to John Doe I, John Doe II, and John Doe III, concerning whom defendants have no knowledge.

2. Defendants admit that United States Letters Patent No. 2,671,537 was issued March 9, 1954 but deny that said patent was either duly or legally issued; defendants are without knowledge concerning the assignments recited in paragraph 2 of the complaint and leave plaintiffs to their proof thereof.

3. Defendants deny each and every allegation of paragraph 3 of the complaint.

4. Defendants admit the allegations of paragraph 4 of the complaint.

And for other and further defenses to the allegations of the complaint, defendants say:

5. The Letters Patent in suit No. 2,671,537 are invalid because the alleged invention or improvements described therein and attempted to be patented thereby, and every material and substantial part thereof, do not embody substantial variations or changes from that which belonged to the state of the art as it existed at the time of the alleged inventions thereof and did not then involve the exercise of the inventive faculty or constitute the subject matter of invention proper to be secured by the grant of Letters Patent within the meaning or intent of the statutes relating thereto.

6. Every material element and combination of elements, and every product recited in the claims

of said Letters Patent in suit No. 2,671,537 were disclosed and set forth in various prior publications and Letters Patent.

7. The Letters Patent in suit No. 2,671,537 is invalid for the reason that the alleged inventions or improvements described therein and set forth in the claims thereof were, prior to the plaintiff Moon's alleged invention and for more than one year prior to the filing of the application for Letters Patent, in public use.

Wherefore defendants deny that plaintiffs are entitled to the relief prayed for or to any other relief and therefore pray that the complaint be dismissed with costs and counsel fees to defendants.

CABOT SHOPS, INC.,
HOWARD SUPPLY
COMPANY,

/s/ By CHARLES G. LYON,
Attorneys for Defendants. [7]

Acknowledgment of Service Attached. [8]

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

STIPULATION

It is stipulated by and between the parties hereto, through their respective counsel;

1. That the complaint in the aforesaid action insofar as it applies to defendants named as John

Doe I, John Doe II, John Doe III, etc. is hereby dismissed without prejudice and without thereby affecting in any way the said action and complaint therein as it applies to the other named defendants;

2. That the complaint in the aforesaid action be amended by interlineation,

(a) by striking from the title the words "John Doe I, John Doe II, John Doe III, etc."

(b) by striking that portion of the complaint, appearing on page 2, lines 2 to 6, both inclusive, and reading "The names and addresses of the other defendants named as John Doe I, John Doe II, John Doe III, etc. are not at presently known to plaintiffs, and plaintiffs request permission to join the same as defendants when the same are ascertained." [9]

3. That the answer of defendants Cabot Shops, Inc. and Howard Supply Co. to the complaint shall be deemed the answer to the complaint as amended above;

4. That the defendants' motion to dismiss the herein action as to John Doe I, John Doe II and John Doe III be removed from the calendar;

5. That the times for plaintiffs and each of them to respond to or take any action with respect to the interrogatories propounded by plaintiffs and served December 27, 1957 shall be extended by seven (7) days addition to the times allowed under Rule 33 of F.R.C.P.

Dated: January 2, 1958.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendants.

Dated: January 2, 1958.

/s/ PHILIP SUBKOW,
Attorney for Plaintiffs.

It is so ordered this 3rd day of January, 1958.

/s/ BEN HARRISON,
U. S. District Court Judge. [10]

[Endorsed]: Filed and Entered January 3, 1958.

—————

[Title of District Court and Cause.]

NOTICE OF MOTION

To: James Moon, Edmond M. Wagner and Philip Subkow and to Philip Subkow, Their Attorney.

You and each of you will please take notice that on the tenth day of February, 1958, at 10 o'clock a.m., or as soon thereafter as counsel can be heard, defendants will bring on for hearing the annexed Motion to Amend.

Dated at Los Angeles, California, this 2nd day of January, 1958.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendants. [11]

[Title of District Court and Cause.]

MOTION TO AMEND

Come Now the Defendants, through their attorneys, and moves this honorable court that the Answer on file herein be amended by interlineation by adding to the end of Paragraph No. 7 after the word "use" and before the period, the words—and on sale—. Upon the hearing of the motion, defendant will rely upon the papers and pleadings on file herein and on the annexed Memorandum of Points and Authorities.

Dated at Los Angeles, California this 2nd day of January, 1958.

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Defendants. [12]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

Section 102 of the Patent Act of 1952 states that a person shall be entitled to a patent unless * * *

(b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of the application for patent in the United States, * * *.

Defendant has pleaded that the subject matter of the patent in suit was in public use more than

one year prior to the application for the patent in suit, but has neglected to plead that such invention was "on sale". Defendants wish to offer proof that the patented invention was on sale within the [13] meaning of Section 102 above quoted more than one year prior to the application for patent in suit within the meaning of:

Lensch vs. Metallizing Co. of America, 39 F. S. 838, 128 F. 2d 654; F.E. Myers & Bro. Co. vs. Goulds Pumps, 91 F. S. 475, 92 F. S. 184; Wende vs. Horine, 225 F. 501; C. F. Burke Electric Co. vs. Independent Pneumatic Tool Co., 234 F. 93; Dittgen vs. Racine Paper Goods, 181 F. 394.

Dated at Los Angeles, California this 2nd day of January, 1958.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendants. [14]

Acknowledgment of Service Attached. [15]

[Endorsed]: Filed January 3, 1958.

PLAINTIFFS' EXHIBIT No. 102

[Title of District Court and Cause.]

DEFENDANT'S ANSWERS TO INTERROGA-
TORIES PROPOUNDED BY PLAINTIFFS
UNDER RULE 33 F.R.C.P.

Comes Now the defendant, Cabot Shops, Inc., and answers the following interrogatories of plaintiffs:

Plaintiffs' Exhibit No. 102—(Continued)
Interrogatory No. I:

Do the following drawings and catalogue pages each correctly show equipment manufactured or sold by defendant Howard Supply Co., defendant Cabot Shops, Inc., or by its predecessor, Franks Manufacturing Corporation, since March 9, 1954?

(a) If as to any of the following catalogue pages the answer is in the affirmative, give the number of units of such equipment so manufactured or sold by each defendant separately and the dates of sale or of manufacture if the same had not been sold, to wit: [16]

1. The Midget Clipper shown at page 1810 of the 1956 Catalogue of defendant Cabot Shops, Inc.

2. The Giant Clipper shown at page 1883 of the 1957 Catalogue of defendant Cabot Shops, Inc.

3. The Super Senior Clipper shown at page 1884 of the 1957 Catalogue of defendant Cabot Shops, Inc.

4. The Senior Clipper shown at page 1885 of the 1957 Catalogue of Cabot Shops, Inc.

Answer: Yes, in the manner following:

(a)

1. Two units using the chassis as shown were manufactured. One was originally built as illustrated but was never sold and was later modified and sold under a different serial number. The other chassis was equipped with a pole mast and sold before manufacture was completed.

Serial 1710 Midget Clipper (w/pole mast) 8-10-54.

Serial 1712 Midget Clipper (w/derrick mast).

Plaintiffs' Exhibit No. 102—(Continued)

Originally built about 9/15/54, but was not sold until 12/21/55 when it was sold after considerable alteration, including replacement of derrick and power plant.

2. Six (6) have been sold

Serial #1709	10/20/54
1719	12/ 6/54
1759	5/ 9/55
1795	8/22/55
1861	2/24/56
1965	2/ 7/57

3. Four (4) have been sold

Serial #1831	12/19/55 [17]
1961	1/16/57
57012-4	6/ 3/57

4. Five have been sold since 3/9/54

Serial #1669	4/15/54
1691	7/16/54
1714	10/21/54
1764	5/24/55
1773	6/15/55

Interrogatory No. II:

Have defendants or either of them since March 9, 1954, manufactured or sold any equipment similar to any of the aforesaid equipment and not shown in any of the aforesaid catalogue pages? If the answer is in the affirmative, designate the model name, model number, to whom the same was sold, where the same was sold and when the same was

Plaintiffs' Exhibit No. 102—(Continued)
sold. If the answer to this Interrogatory II is in the affirmative, state whether the said models are shown in any of the exhibits introduced in connection with the deposition of Mr. Wayland B. Woody taken in Tulsa, Oklahoma in June of 1957, and if so introduced identify the said exhibits by the exhibit number. If not so introduced, state whether defendants or either of them have in their possessions drawings, photographs, descriptive matter or printed matter, catalogues or advertisement showing the same.

Answer: No.

Interrogatory No. III:

In connection with any of the aforesaid items identified in Interrogatory No. I, were any of the aforesaid sold within the Southern District of California since March 9, 1954? If the answer to the aforesaid interrogatory is in the affirmative, give the name of the purchaser and the date of the sale.

Answer: One (1) sold 2/24/56. [18]

Interrogatory No. IV:

State when Franks Manufacturing Corporation first began the design of a portable derrick of a telescopic lattice type similar to any of the equipment referred to in Interrogatory No. I and when was the design completed. State when the construction of the first unit corresponding to any of the units referred to in Interrogatory No. I started and when completed.

Answer: Design began either the latter part of

Plaintiffs' Exhibit No. 102—(Continued)

September or first of October, 1938. Dean E. Foster was the engineer assigned. The general design was established and substantial portion of the working drawings made before he left in early December. Drawings were completed, the parts manufactured, and the unit delivered to the customer 3/15/39.

Actual construction of a drive-in unit began in 1951 and was completed in 1952.

Interrogatory substituted by stipulation for Interrogatories V, VI, and VII.

Give for each model referred to in Interrogatory No. I and the model referred to in Interrogatory No. II sold by defendants or either of them the following information:

1. Did the Howard Supply Co. or the Franks Manufacturing Corporation, predecessor in business of defendant Cabot Shops, Inc., prior to the manufacture or sale by the Franks Manufacturing Corporation of any of the equipment referred to in Interrogatory I or Interrogatory II, manufacture or sell portable telescopic derricks such as or similar to those advertised by said Franks Manufacturing Corporation at pages 1349-1352, both inclusive, of Volume 1 of the Composite Catalog of Oil Field and Pipeline Equipment (1948-16th Edition)?

2. If the answer to the foregoing Interrogatory I is in the affirmative, give with respect to each of such equipment so sold: [19]

Plaintiffs' Exhibit No. 102—(Continued)

(A) The model number thereof;

(B) The weight on the front wheels of the model moving under its own power on the road, the number of such front wheels and the state or states to which the same were shipped, and the dates of each such shipment, unless the same has been previously identified, and

(C) The weight on the rear wheels of the model moving under its own power on the road, the number of such rear wheels and the state or states to which the same were shipped, and the dates of each such shipment, unless the same has been previously identified, and

(D) If the facts referred to in 2 above, A to C all inclusive, are unknown to defendants, give the total weight on the front and rear wheels of the model moving under its own power on the road, the number of such front and rear wheels and the state or states to which the same were shipped, and the dates of each such shipment, and

(E) The front overhang of the derrick in front of the bumper, if a bumper was used, or, if no bumper was used, in front of (a) the front end of the vehicle, (b) the forward most point of the front tires, and (c) the state to which each of so identified units were so shipped and the dates of such shipment.

Answer: 1. Franks Manufacturing Corporation together with its successor has continuously produced and sold telescoping mast of the same basic type from 1939 to the present. The production of

Plaintiffs' Exhibit No. 102—(Continued)

drive-in units has had no material effect on design or production.

2. The questions of parts A, B, and C can only be answered as follows: The variation of components possible under a given model designation could easily cause a 100% variation in total weight and its distribution. Few if any exact duplicate units were ever produced. A summation of the information is this: [20]

(a) Units were produced with two or three axles.

(b) The weight on the front axle might vary from 7,000 lbs. to 19,000 or 20,000 lbs.

(c) The weight on the rear wheels might vary from 22,000 lbs. to 50,000 lbs.

(d) These units were sold and the same type are still being sold in most of the oil producing states and foreign countries.

(e) The front overhang of the telescopic masts referred to varied from (0') zero ft. to approximately twenty-eight ft.

Interrogatory No. VIII:

Did any of the customers of Franks Manufacturing Corporation, prior to the manufacture of the Clipper units referred to in Interrogatory No. I, request that they be supplied with portable lattice derricks of the telescopic type mounted on motor vehicles which would comply with the laws of the various states regarding the movement of such vehicles over public roads? If the answer is in

Plaintiffs' Exhibit No. 102—(Continued)
the affirmative, state the names of the customers and the dates of the requests.

Answer: I am certain that verbal suggestions were made from time to time. As a matter of fact, the only excuse for designing and producing the telescoping derrick mast in the first place was to make possible use of a doubles mast having tolerable road lengths both from the practical usage standpoint and highway permissibility.

Interrogatory No. IX:

Has defendant Cabot Shops, Inc. in its possession or control any drawings, reports, data, photographs made either by Mr. Aular or by Mr. Wayland B. Woody, or correspondence to either of them or sent by either of them while said Mr. Aular [21] or Mr. Woody were in California subsequent to June of 1946-48 and during the period of and in connection with the design of portable telescopic lattice derricks mounted on motor vehicles for defendant's predecessor, Franks Manufacturing Corporation? If the answer is in the affirmative, were any of the same introduced in connection with the deposition of Mr. Woody, taken in Tulsa in June of 1957? If so introduced identify the same.

Answer: Such files and data as existed have apparently become lost or destroyed some years ago to reduce storage.

Interrogatory No. X:

Have defendants or either of them in their pos-

Plaintiffs' Exhibit No. 102—(Continued)

session or control correspondence between Franks Manufacturing Corporation and Mr. Richard White, the brother of Mr. Carl White, then President of Franks Manufacturing Corporation, while said Mr. Richard White was in California, which correspondence relates to the design, manufacture or sale of portable lattice telescopic derricks which would comply with the laws of the State of California relating to movement of motor vehicles over the public roads of California?

Answer: We are unable to find these files. Present management maintains a schedule of retention time of various classes of files.

Interrogatory No. XI:

Do defendants or either of them have in their possession or under their control correspondence between Franks Manufacturing Corporation and the State of California, during the period of 1949-52, relating to the legality or illegality of portable telescopic lattice derricks mounted on vehicles manufactured by said Corporation or to the proposed design thereof by said Corporation.

Answer: No. [22]

Interrogatory No. XII:

Have defendants or either of them in their possession or under their control any correspondence to or from Franks Manufacturing Corporation relating to Exhibit 19, introduced in connection with the Woody deposition taken in June of 1957?

Answer: No.

Plaintiffs' Exhibit No. 102—(Continued)
Interrogatory No. XIII:

Has any officer or employee of Franks Manufacturing Corporation seen a 321 or a 421 Drive In unit manufactured by Waldrip Engineering Co.? If the answer is in the affirmative, give the name of such officer or employee and the date on which the same was first seen.

Answer: We have no record of whom in the employ of Franks Manufacturing Corporation may have seen a Waldrip 321 or 421 Drive-In unit, nor do we have a record of any dates such employees may have seen such equipment.

Interrogatory No. XIV:

Where and when and from whom did Franks Manufacturing Corporation obtain Exhibit 8, introduced in connection with the deposition of Cleon James Moon, also known as James Moon, given on April 20, 1957?

Answer: We do not know. Probably from a customer. Sales departments continuously obtain copies of competitive quotations and data.

Interrogatory No. XV:

Prior to the design of the first Clipper unit by Franks Manufacturing Corporation did any officer or employee of Franks Manufacturing Corporation see any drawings, photographs, catalogues of the Drive In unit manufactured by Waldrip Engineering Co.? If the answer is in the affirmative, give the date when any thereof was first seen and iden-

Plaintiffs' Exhibit No. 102—(Continued)

tify the same if the same forms any exhibit introduced in connection with the aforesaid depositions of Mr. Woody or Mr. Moon. [23]

Answer: There is no specific data of record as to any individual or time. It may be presumed that any employee who may have been on the mailing list to receive the Waldrip house organ "The Wildcatter," probably gave at least cursory inspection of any illustrations included. There is no record or recollection that any revelations included in this publication made any profound impression or influence on anyone in the Frank's organization.

Interrogatory No. XVI:

Prior to the design shown in Exhibit 3, introduced in connection with the aforesaid deposition of Wayland B. Woody, did Franks Manufacturing Corporation do any design work or make any drawing of any equipment in which a lattice telescopic derrick is mounted on a motor vehicle so that the crown of the derrick extends to the rear of the vehicle as it is driven and in which means are provided to hinge the derrick to the vehicle and to erect the derrick by rotation of the derrick about said hinge?

Answer: It is a matter of recollection of Mr. W. B. Woody of the defendant corporation that Mr. Aular made several proposal layouts and that these were drive-in units, although the drive-in feature was about the only similarity to equipment produced in recent years. Since Aular's drawings

Plaintiffs' Exhibit No. 102—(Continued)

were only proposals, they were not brought back to the main plant at Tulsa and incorporated in the permanent drawing files.

Interrogatory No. XVII:

If the answer to the foregoing Interrogatory No. XVI is in the affirmative, state whether the defendants or either of them have in their possession or under their control any drawings, photographs or descriptive matter showing the same or any reports or correspondence relating thereto and whether any thereof have been introduced in connection with the aforesaid deposition of Mr. Wayland B. Woody and, if so, identify the same by exhibit number. [24]

Answer: There is none.

Interrogatory No. XVIII:

Did the Franks Manufacturing Corporation sell to the Richfield Oil Company in California portable telescopic derrick mounted on a motor vehicle in which the engine was placed behind the cab? If the answer to this interrogatory is in the affirmative, give the model number, date of sale and place of delivery of such unit. If the said unit is shown in any of the catalogue pages referred to in Interrogatory No. I, identify the model to which said unit corresponds. If the said unit is not shown in any of the aforesaid catalogue pages, do defendants or either of them have in their possession or under their control drawings, photographs or other representations of said equipment?

Plaintiffs' Exhibit No. 102—(Continued)

Answer: If the question is intended to refer to a drive-in type unit, the answer is no. Franks Manufacturing Corporation never has sold Richfield Oil Corporation such unit.

Interrogatory No. XIX:

Did Cabot Shops, Inc. or its predecessor, Franks Manufacturing Corporation, sell any equipment to the Pacific Western Oil Company, which unit had a telescopic lattice type derrick mounted on a motor vehicle with the crown of the derrick to the rear of the motor vehicle? If the answer is in the affirmative, state the model and date of sale thereof and whether the same is shown in any of the catalogue pages referred to in Interrogatory No. I and, if so included, identify the model.

Answer: Yes. Such unit was a "Giant Clipper" such as is shown on page 1883 of plaintiffs Ex. #1. It was delivered to Pacific Western March 19, 1953, according to records.

Interrogatory No. XX:

State in what respect defendant claims that the Patent No. 2,671,537 was not either duly or legally issued, as alleged in Paragraph 2 of Defendants' Answer. [25]

Answer: Patent No. 2,671,537, the patent here in suit was not duly or legally issued because:

1. More than one year prior to June 28, 1948, the date on which application for said patent was filed, the alleged invention which is the subject matter of the patent was described in a printed

Plaintiffs' Exhibit No. 102—(Continued)
publication in this country and was offered for sale in this country.

2. The alleged invention was known and used by others in this country before the alleged invention by the plaintiff Moon.

3. The plaintiff Moon abandoned his alleged invention.

4. The subject matter of the alleged invention differed from the prior art only in respect to matters which would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art.

Interrogatory No. XXI:

State the date upon which it is alleged by defendants in Paragraph 5 of their Answer that the invention, identified by defendant as the "alleged invention" in said Paragraph 5, was made and state if defendant will rely on evidences other than those referred to in Paragraphs 6 and 7 of the Answer to show the State of the art and, if so, state of what such evidences consist.

Answer: Defendant is presently without independent knowledge as to the date of the making of the alleged invention by the plaintiff Moon. Defendant will not rely upon evidence as to the prior art other than patents and publications previously called to the attention of plaintiffs except for Waldrip advertisements appearing in journals and publications in 1946 and 1947.

Plaintiffs' Exhibit No. 102—(Continued)

Interrogatory No. XXII.

State what part or parts of the invention or improvement referred to in Paragraph 5 of the Answer does not embody substantial variations of changes from that which belong to the State of the [26] art as it existed at the time of the alleged inventions thereof, as alleged in Paragraph 5 of Defendants' Answer.

Answer: There is no part of the alleged invention which embodied substantial variation or change from the state of the art as it existed at the time of the alleged invention.

Interrogatory No. XXIII:

Give the name, date, title and pages of the publications referred to in Paragraph 6 of the Defendants' Answer.

Answer: Complete information as to publications has been either given to plaintiff by defendant's counsel or given by plaintiff in its answers to defendant's interrogatories, except a Waldrip advertisement appearing in the May, 1947, issue of "The Petroleum Engineer."

Interrogatory No. XXIV:

Give the numbers, dates and country issuing each of the patents referred to in Paragraph 6 of said Answer, which defendants will urge at the trial best disclose the material elements and combinations of elements as alleged in said Paragraph 6.

Answer: Defendant will rely upon the following

Plaintiffs' Exhibit No. 102—(Continued)
patents to disclose the elements of the alleged invention:

(Ex. 16 Patents.) (See Attached List.)

Interrogatory No. XXV:

Give the date and place of the public use referred to in Paragraph 7 of the Answer and the name of those making such use and the names of all witnesses known to defendants having knowledge of such use.

Answer: Defendant withdraws the defense of prior public use.

Interrogatory No. XXVI:

State when, where and by whom "Moon's invention was 'on sale' ", as is alleged by defendants in their Motion to Amend their Answer set to be heard on February 10th.

Answer: Moon's alleged invention was on sale at least as early [27] as April, 1947, at Waldrip Engineering Company, 11810 Center Street, Hollydale, California, by Waldrip Engineering Company.

Interrogatory No. XXVII:

Have defendants or either of them any documents, drawings or correspondence relating to the placing on sale, as alleged in said Motion, and, if so, identify the same.

Answer: Defendant has advertisements of Waldrip Engineering Company in "The Petroleum Engineer" of April, 1947, May, 1947, and June, 1947, and product announcements in the "Oil

Plaintiffs' Exhibit No. 102—(Continued)

Weekly" of May 5, 1947, and in the "Oil and Gas Journal" of May 10, 1947.

Interrogatory No. XXVIII:

Has the Patent referred to on page 1886 of the 1957 Catalogue of defendant Cabot Shops, Inc. been issued? If the answer is in the affirmative, identify the same by number.

Answer: No.

CABOT SHOPS, INC.,
/s/ By FRED C. FERNALD,
Vice-President.

Duly Verified.

EXHIBIT 16

Pat. No.

966,346	Aug. 2, 1910	Morton
1,096,022	May 12, 1914	Downie
1,395,895	Nov. 1, 1927	Bellony
1,594,909	Aug. 3, 1926	Steele
1,894,432	Jan. 17, 1933	Watson
1,897,383	Feb. 14, 1933	Burgoyne
2,151,057	Mar. 21, 1939	Suth
2,204,713	June 18, 1940	White
2,215,920	Sept. 24, 1940	Franks
2,276,224	Mar. 10, 1942	Cardwell
2,343,517	Mar. 7, 1944	Alexander
2,488,180	Nov. 15, 1949	Evans

Acknowledgment of Service Attached. [30]

[Endorsed]: Filed February 21, 1958.

[Title of District Court and Cause.]

PLAINTIFFS' PRETRIAL STATEMENT OF FACTS

1. Plaintiffs are jointly the owners of the patent in suit by assignment from Western Oil Tool & Engineering Co., Inc., the original assignees of the patent by assignment from James Moon, the applicant and patentee, also known as Cleon James Moon. Plaintiffs by said assignment are also the assignees of all the rights of Western Oil Tool & Engineering Co., Inc. to collect for past infringement of said Letters Patent.

(Proof by admission by Answer and Stipulation, and by evidence—testimony and documents.)

2. (a) Prior to 1948, portable derricks employed for servicing and drilling oil wells of the telescopic lattice or trussed four-legged type, were of the back-in type.

(b) These are so called because a derrick was transported and mounted on the vehicle so that it was hinged at the back end of the vehicle. The driver and engine were [42] positioned at the front end of the vehicle. The vehicle had to be backed into the location in order to erect the derrick.

(Proof by evidence by testimony and documents.)

3. (a) Pole masts were also employed.

(b) These pole masts were so called because in their early design they consisted of a single tube which in some cases was telescopic and which was mounted upon a vehicle.

(c) These pole masts were mounted on vehicles either to pivot on the rear of the vehicle in a "back-in" type or in early types to pivot at the front of the vehicle in a "drive-in" type.

(Proof by evidence by testimony and documents.)

4. (a) The pole masts were introduced prior to 1919 to replace permanently installed derrick and hoisting equipment on cable tool.

(b) A rather crude mobile servicing machine was constructed by placing a hoist drum on the front end of the tractor. The drum was driven by a flat belt from a power take-off pulley on the side of the tractor.

(c) The hazards in using this machine were considerable and usually it was necessary because of the fire hazard to place the machine 100 feet or so away from the well and pull through a floor block.

(Proof by evidence—testimony and documents.)

5. (a) Later a pole mast was hinged on the front end of the tractor above the drum and forward of the drum.

(b) This permitted the tractor with the hoist and pole mast to be driven directly to the well site instead of backing in.

(c) The driver still sat at the rear of the tractor with the hoist on the front end and the engine between him and the hoist and the pole hinge. [43]

(d) This design positioned the engine close to the well head and created a fire hazard.

(Proof by evidence—by testimony and documents.)

6. (a) The above design, as stated in 4 and 5 above, had a certain utility for the shallow wells then characteristic in the industry.

(b) When deeper wells were drilled, these pole mast units lost part of their usefulness since they could not be used in the deeper wells where the loads were high.

(Proof by evidence—by testimony.)

7. (a) The first step prior to the development of the portable telescoping lattice type mast in adapting the portable equipment to deeper wells, was to increase the size of the pole mast and of the hoisting equipment.

(b) When this was done, the large pole mast was hinged on the rear of the truck.

(Proof by evidence—by testimony and documents.)

8. Double pole masts of the telescoping type also were used.

(Proof by evidence—by testimony and documents.)

9. (a) These vehicles were built along the lines of conventional trucks with the hoist drum at the rear being driven by the engine which was at the front of the vehicle.

(b) The cab was located between the hoist drum and this engine.

(c) The pole mast was hinged at the rear of the vehicle.

(Proof by evidence—by testimony and documents.)

10. Single pole masts as used prior to 1947 were limited in height and were of limited capacity. They were not suitable for well servicing operations where the loads ran high, such as in jarring or in unseating packers or in taking a pull [44] equal to the parting strength of the tubing or drill pipe.

(Proof by evidence—by testimony and documents.)

11. The setup time where a large number of guys had to be secured to dead men located in the ground made them uneconomic in terms of time.

(Proof by evidence—by testimony and documents.)

12. The pole mast designs known prior to Moon's invention were of no help in the design of portable truss-type masts.

(Proof by evidence—by testimony and documents.)

13. (a) The portable telescopic truss-type derricks of the back-in kind were substituted for permanent derricks previously employed in many instances.

(b) Because of their versatility they also replaced pole type masts in many services for which pole type masts had been used previously.

(Proof by evidence—by testimony and documents.)

14. (a) Defendant's predecessor, Franks Manufacturing Co., manufactured and sold a telescopic truss type back-in truck mounted derrick in 1939.

(b) Previously it had built back-in derricks which were not telescopic and were designed for light service in which they used hydraulic jacks to erect the derrick.

(Proof—(a) by admission in defendants' Answers to plaintiffs' Interrogatories; (b) by evidence—by testimony and documents.)

15. However, when Franks designed the telescopic derricks in 1939 for heavy duty on oil wells, they abandoned the hydraulic jacks because they believed them to be unsuitable for this service and too hazardous and developed a screw-raising mechanism.

(Proof by admission in defendant's catalogues [45] and by testimony and documents.)

16. One of the difficulties with the back-in units was that they did not comply with highway laws of the various states in that they could not be built so as to comply with:

(a) The limitations of loading on the front or rear wheels; or with

(b) The overhang requirements, or overall height requirements.

(Proof by evidence—by testimony and documents.)

17. Additionally, the position of the derrick was such that the top of the derrick had to protrude in front of the vehicle for more than was allowable under the highway laws of many states.

(Proof by evidence—by testimony and documents.)

18. The derrick thus also limited the upward vision in front of the driver.

(Proof by evidence—by testimony and documents.)

19. The back-in unit had to be spotted by backing in. Since for a servicing unit the spotting must be very accurate in order to align the crown with the axis of the well, this required the help of spotters who were positioned on the ground and the spotting was a ticklish job, especially when the quarters were close. It was also very time-consuming.

(Proof by evidence—by testimony and documents.)

20. (a) Franks had many competitors. They produced portable derricks in which the derrick was hinged on the back of the truck.

(b) However, all of these units, both Franks and their competitors, had the same problem with respect to compliance with State laws and customers were in trouble with the Highway authorities.

(c) They could move the derricks only by getting special permits which restricted the motion to good weather in [46] the daytime, during the week. Movement during bad weather on holidays or week ends or at night was prohibited.

(d) If the weights were too excessive and beyond the permit limit, the derrick had to be dismounted and moved separately.

(Proof by evidence—by testimony and documents.)

21. (a) Users of back-in derricks demanded that they be supplied with units that they could move over the road at any time without special permit without interference by the police.

(b) Until the drive-in unit, Franks and other manufacturers of back-in units were unable to supply portable telescopic lattice type masts which would meet these requirements.

(c) Customers were forced to accept back-in units which could not qualify as legal units in the several states in which the same were employed or to try other solutions of the problem of mobility (see Items 22 and 23).

(d) This state of affairs continued from 1939 to the introduction of the drive-in unit by Waldrip Engineering Co. in 1948.

(Proof as to (a) by admission in defendant's, Cabot Shops, Inc., Answers to plaintiffs' Interrogatories. Proof as to (a) through (d), by evidence by testimony and documents.)

22. The inability to carry large derricks in integrated units and also to comply with State Highway laws led to other solutions where the derrick was transported separately from the hoist and its driving engine.

(Proof by evidence—testimony and documents.)

23. This included both fixed height and telescopic derricks.

(Proof by evidence—testimony and documents.)

24. (a) Defendant's predecessor, the Franks [47] Manufacturing Corp., for long prior to the

construction by Franks of its first Clipper unit had knowledge of the illegality of the back-in units.

(b) They tried unsuccessfully to solve the problem of producing a legal integrated portable telescopic derrick by means other than the design of the units accused of in this litigation.

(c) These designs were unsuccessful and were abandoned in favor of the drive-in design accused in this action as an infringement.

(Proof of (a), by admission in defendant's, Cabot Shops, Inc., Answers to plaintiffs' Interrogatories, and as to (a), (b) and (c), by testimony and documents.)

25. (a) Not until Franks introduced their Clipper units of the drive-in type in 1952 did they have a unit for sale which could comply with the Highway laws of California and other states in which its customers desired to use such portable units.

(b) They advertised the availability of such units to the trade as a great advance in this art.

(Proof by admission by defendant Cabot Shops, Inc. and its predecessors in their advertisements, and by testimony and other documents.)

26. (a) In June of 1944, Moon conceived the idea of positioning a telescopic derrick on a truck so that it could be driven with its feet to the front into the location.

(b) At that time he had not worked out the means by which such a construction could be achieved in a practical way nor had he determined whether such a unit could be made to comply with

the Highway laws of California or other states of the United States.

(Proof by evidence—testimony and documents.)

27. (a) Subsequently and some time prior to November 5, 1945, Moon conceived the idea of mounting the derrick so that it [48] would be hinged on a hinge positioned on the derrick near its bottom and also positioned on a hinge support mounted on the chassis, with the hinge positioned above the driver's position. The engine was to be placed to the rear of the truck and the hoist drum positioned at the rear of the cab which was to be at the front of the truck. The derrick was to be erected by a screw-lifting mechanism which he had previously developed for use in a back-in unit.

(Proof by evidence—testimony and documents.)

28. (a) The Waldrip Engineering Co., was then the licensee of the Western Oil, Tool & Engineering Co., to whom Moon had assigned his inventions in this field, and decided to construct such a unit.

(b) Moon joined the company as a vice-president in charge of the project.

(Proof by evidence by testimony.)

29. From further studies made by Moon concluded that in order to provide sufficient room for the screw-raising mechanism, the hoist drum had to be moved backwards towards the end of the truck and the engine had to be moved backwards towards the end of the truck. The weights thus imposed upon the rear wheels would be in excess of that permitted by the Vehicular Code of California in force in 1946.

(Proof by evidence by testimony.)

30. (a) During the month of November, 1946, Moon conceived the idea of employing, instead of the screw-raising mechanism, hydraulic jacks so mounted as to transmit the raising load to the chassis between the front and rear wheels.

(b) He made a drawing dated December 12, 1946.

(c) He concluded that this design provided enough room on the truck to permit him to move the hoist drum and the [49] engine forward towards the front of the vehicle.

(Proof by evidence—testimony and documents.)

31 (a) Moon did not yet know, however, that such a design would produce a legal unit with respect to the loading on the front wheels as well as on the rear wheels.

(b) He was hopeful that this would be accomplished because of the shifting of the weight of the engine from the front to the rear wheels and his ability to adjust the location of the units relative to the front and rear wheels to provide the desired loading on both the front and the rear wheels which would comply with the Highway laws of the various states in which such vehicles could be used for servicing oil wells.

(Proof by evidence by testimony.)

32. Having achieved what appeared to Mr. Moon to be a successful solution of the problem of producing a legal unit, active design of the unit began prior to January, 1947.

(Proof by evidence—testimony and documents.)

33. The main chassis assembly design was completed on January 14, 1947 and continually thereafter up to the final construction of the first unit, a continuous effort in the design and construction of the unit occurred.

(Proof by evidence by testimony and documents.)

34. (a) Since it appeared to Waldrip Engineering Co. that this project would be quite a costly one to them, they desired to know whether a successful business could be established in this type of unit.

(b) Early in 1947, they published certain advertisements to obtain information as to the interest of the industry.

(c) For such purpose an artist was instructed to make a drawing of the side elevation showing the external appearance corresponding to the drawing made by Moon on December 12, 1946 [50] but omitting all structural and mechanical features relating to design or operation of the unit.

(d) At that time the derrick and many of the other components of the unit had not yet been designed.

(Proof by evidence by testimony and documents.)

35. As Waldrip Engineering Co. obtained by the end of the year 1947, two orders—one from the General Petroleum, Unit 321-1 and one from the Standard Oil Company of California, Unit 321-2, and a third order in January, 1948 for Unit 421-1.

(Proof by evidence by testimony.)

36. Active design of the units began prior to January 1947 and continued actively up to and during the period of construction.

(Proof by evidence by testimony and documents.)

37. (a) Some time during the period of design and prior to the start of construction, doubt arose in Mr. Moon's mind as to whether the design as conceived and shown in the December 12, 1946 drawing with the hinge positioned on the derrick and positioned on the chassis would permit of a legal design, based on the laws then in force in California.

(b) It was decided to so mount the derricks so that it could be slid forward from its road position to its erection position.

(Proof by evidence by testimony and documents.)

38. (a) Engineering releases of drawings were made to the shop for construction beginning late November, 1947.

(b) As sections of the unit were released by the engineering department to the shop, construction was started. The shop started construction and actively pursued continuously from November 1947 until the first unit was assembled ready for delivery.

(c) The first two units built were of the [51] character described in Item 37 (b).

(Proof by evidence by testimony and documents.)

39. While the first unit was completed for test purposes, late in April of 1948, certain modifications were made in the following six weeks, con-

timing until after the filing of the application in June 28, 1948.

(Proof by evidence by testimony and documents.)

40. It was decided by Waldrup with the consent of General Petroleum Corp., the customer, to test the unit at Wilmington, California before delivery to General Petroleum.

(Proof by evidence—by testimony and documents.)

41. During March and April, studies were made of the distribution weight on the rear and front wheels of the sliding type derrick with the derrick slid to the erecting position, but with the derrick crown resting on the chassis. It was determined by these studies that the unit driven in this position would comply with the laws of California regarding weight distribution and would not excessively load the tires.

(Proof by evidence by testimony and documents.)

42. It was concluded by Mr. Moon that the original design shown in the December 12, 1946 drawing would result in a unit legal in California with regard to weight imposed on the wheels.

(Proof by evidence by testimony and documents.)

43. It was thus established by experiment that the original design would be legal. The extension of the legs from a distance in front of vehicle, legal under the laws of California, to the erection position required telescoping the legs so that they would extend the legal distance in front when the

vehicle was transported and could be extended to any desired length to rest upon supports on the ground when erected.

(Proof by evidence by testimony and documents.)

44. Experience with these two sliding type derricks indicated that the fixed type derrick, with the hinge positioned on the derrick and positioned on the chassis was superior.

(Proof by evidence by testimony.)

45. It was found that great caution had to be exercised when sliding the derrick forward in order to prevent the derrick being displaced dangerously on the truck by jumping the tracks provided for sliding the derrick.

(Proof by evidence by testimony.)

46. (a) Since the first two units that had been ordered were practically completed, no modification was made of these units.

(b) However, the third unit, which was delivered to Standard Oil Co. of California after June, 1948 was modified prior to delivery so that the hinge was positioned on the derrick and positioned on the chassis.

(Proof by evidence by testimony.)

47. (a) Waldrip Engineering Co. built three other units similar to the third unit built.

(b) They were all constructed and delivered subsequent to the filing of the patent application.

(Proof by evidence by testimony and documents.)

48. (a) September of 1946, Franks Transporta-

tion Co. learned of Moon's concept of the drive-in unit.

(b) However, admitting that the design appeared ingenious, Mr. Woody, then Vice President in charge of Engineering of Franks, doubted its practicality and believed that the weights would be excessive.

(Proof by evidence by testimony and documents.)

49. (a) By 1949, the problem of the illegality of the back-in units became so acute that they were forced by [53] competition from Waldrip to attempt to design a legal unit.

(b) Franks first tried to modify the back-in unit previously manufactured by them in order to make it comply with the Highway laws but failed to solve the problem by this method.

(c) They sent an engineer to California to design a legal unit.

(d) His designs constituted a modification of the back-in unit which was found to be entirely unsuitable by Franks.

(Proof by evidence by testimony and documents.)

50. (a) During and prior to the completion of the design of the first Clipper unit by Franks they had learned of the Moon design of the drive-in unit manufactured by Waldrip.

(b) They had obtained a copy of a brochure prepared by Moon for Waldrip.

(c) This brochure was a confidential bulletin which was shown to the personnel of Waldrip in confidence and to be kept secret and disclosed to

no one unless the said disclosure be received as a confidential disclosure to be kept secret and confidential by the recipient.

(d) The units manufactured by Waldrip were then in the field and in use.

(e) Waldrip had advertised these units.

(Proof as to (a) and (b), by admission in the Answers of defendant Cabot Shops, Inc. to plaintiffs' Interrogatories, and as to (a) through (e), by evidence by testimony and documents.)

51. (a) With this information before them, the defendant started a design in 1949 and completed the first Clipper unit in 1952.

(b) This design followed the design of the [54] brochure and of the models manufactured by Waldrip at that time.

(Proof by evidence by testimony and documents.)

52. (a) Franks subsequently designed various models employing two and four front wheels and moving the hinge point back and forth with respect to the front axle.

(b) All of these structures are substantially the same in construction and function.

(c) In all of these forms the same design characteristics appear.

(d) They are severally identified and advertised in the catalogues of defendant Cabot Shops, Inc., as follows:

(i) Midget Clipper, shown at page 1810 of the 1956 catalogue;

(ii) Giant Clipper, shown at page 1883 of the 1957 catalogue;

(iii) Super Senior Clipper, shown at page 1884 of the 1957 catalogue;

(iv) Senior Clipper, shown at page 1885 of the 1957 catalogue.

(Proof by admission by defendant Cabot Shops, Inc. in their Answers to plaintiffs' Interrogatories, and in the deposition of Mr. Woody when called by plaintiffs, and by evidence by testimony and documents.)

53. (a) At least 16 of such units were sold since March, 1954 and prior to filing of this action, and at least one thereof was sold in the Southern District of California.

(b) That at all such times Franks and subsequently defendant, Cabot Shops, Inc., maintained an established place of business in Los Angeles County.

(c) That on or about the 5th day of [55] April, 1955, said Franks Manufacturing Corp. did merge with Cabot Shops, Inc., the herein defendant, and acquired all liabilities of said Franks Manufacturing Corp.

(d) That defendant, Cabot Shops, Inc., does not claim any ownership or any part of the right, title and interest in or to said Letters Patent 2671537, or in or to the invention and discovery secured thereby or any shop right, or any other right or license thereunder or thereto.

54. (a) Defendant, Howard Shops, Inc., is a California corporation, having its principal place of

business in Los Angeles County, has been and is now and prior to the filing of this Complaint was the sales representative of Cabot Shops, Inc., a defendant herein, and joined with defendant, Cabot Shops, Inc., in the sales made in the said Southern district of California.

(b) Cabot Shops, Inc. has agreed to indemnify Howard Shops, Inc. against any judgment in this action, and is paying all costs in connection with the defense of this action and is directing and in control of the defense of this action.

(Proof by evidence by testimony and documents.)

55. These "Clipper units" all have the following characteristics also possessed by the structure described in the Moon Patent:

A. The derrick is a four-legged truss type lattice telescopic derrick which when erected to the vertical position, at the front of the vehicle, has its axis inclined to the perpendicular.

B. The derrick when erected, is capable of carrying the loads imposed on the derrick and to transmit the loads to the ground through structure elements which include the derrick legs.

C. The derrick load transmitting structure is such that the base of the derrick is larger than the [56] cab dimension measured transversely of the cab.

D. This structure includes also framing for the hinge point so as to carry load on the derrick legs to the ground through a framework which transmits the load to the chassis and from the chassis through jacks to the ground.

E. The hinge point is positioned on the derrick near its end and on the chassis above the driver's position so that as the derrick moves towards the vertical position it will be erected at the front of the vehicle.

F. When erected, the structure for carrying the loads to the ground straddles the truck and cab.

G. The hinge supporting structure provides a protective framework for the driver and supplies a porthole which gives him clear vision of the road and protects the driver from the overhead load.

H. The position of the hinge and the location of the derrick erecting mechanism is such that the mechanism transmits the erecting load to the chassis between the front axle and the rear axle.

I. The load of the derrick as it is erected and moves towards its perpendicular position is transmitted to the chassis to the ground and produces a load distribution resulting in a chassis frame deflection which is well within the allowable strain in the structure. [57]

J. By positioning the engine at the rear of the vehicle and hinging the derrick at the front of the vehicle, the center of mass of the structure is moved towards the rear side of the center line of the vehicle, thus giving to the drive-in unit stability during raising and in use.

K. Whether in the construction the hinge point is forward or backward of a given point at the front of the truck but sufficiently forward to permit the erection of the derrick at the front of the vehi-

cle, the structures all produce substantially the same results in substantially the same way.

L. The arrangement with the motor at the rear of the truck and with the crown of the derrick to the rear of the truck and with the cab at the front of the truck has also the following advantages:

(a) By placing the driver next to the base of the derrick, he can spot the derrick by driving directly to the desired location;

(b) The arrangement of the parts makes it possible to limit the front leg extension to any desired amount in front of the vehicle by providing cooperating structure to carry the load to the ground;

(c) Room is provided on the truck for the hoist and also room for positioning the erecting jack and room for its rotation to erect the derrick;

(d) The arrangement provides room for positioning the major weight on the rear wheels and provides room for shifting the motor and hoist so as to place the right proportion of the [58] weight on the rear and front wheels.

(Proof of the above Item 55 and all its parts
—by evidence by testimony and documents.)

56. In contrast, the back-in unit compared with comparable drive-in units designed for like service on wells:

(a) When designed for service on petroleum wells, could not be made legal with respect to the load distribution.

(b) Could not be made legal in many states, including California, with respect to the front overhang.

(c) Had difficulty meeting overall height requirements of the Highway laws.

(d) Had serious frame deflection on erection of the derrick.

(e) Had no overhead framing to provide a safety frame for the driver.

(f) Was more difficult to spot and required more labor for such erection.

(g) Back-in units manufactured prior to 1948 were structures which were less stable during erection and in use than comparable drive-in units manufactured since Moon's invention was first put on the market.

(Proof by evidence by testimony and documents.)

57. The Patent 2671537 describes an invention not known or used by others in this country or patented or described in any printed publication cited by the defendants in this action and having a date prior to the invention thereof by Mr. Moon, or having any other date. Nor is the invention patented described in a printed publication in this or a foreign country, or in public use or on sale in this country for more than one year prior to the date of the publication for the patent in suit, nor has the [59] invention been abandoned by Moon. Nor is the invention described in a patent granted on an application for patent by anyone else filed in the United States before the invention by Mr. Moon. Mr. Moon himself invented the invention. And also the differences between the subject matter sought to be patented and the prior art is such that the subject mat-

ter as a whole would not have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

(Proof by evidence by testimony.)

58. The following have been licensed under the patent in suit:

Hopper Machine Works, Inc.

Ideco Division, Dresser Equipment Co.

Wagner-Morehouse, Inc.

(Proof by evidence by testimony.)

In the above Pre-Trial Statement the term "testimony" includes oral testimony given at the trial and testimony by depositions. "Documents" includes both verbal and graphical documents, for example, drawings, photographs and prints.

Dated: February 26, 1958.

/s/ PHILIP SUBKOW,

In Propria Persona,

Attorney for Plaintiffs. [60]

Acknowledgment of Service Attached. [61]

[Endorsed]: Filed February 26, 1958.

[Title of District Court and Cause.]

DEFENDANTS' PRETRIAL OPENING STATEMENT

In accordance with Paragraph 7 of the Pretrial Order of April 2, 1957, defendant, Cabot Shops,

Inc., submits herewith its Pretrial Opening Statement.

1. The patent in suit relates to portable masts or derricks which have been used in the oil industry since at least as early as 1914. These portable masts or derricks have been mounted on various types of vehicles and for the most part have been rear-erecting. That is the base of the derrick is carried at the rear of the vehicle adjacent which the derrick is erected. Nevertheless, there were such masts or derricks designed for [62] front-erection. (U. S. Patents, Exhibit 16; Franks Mfg. Co. catalogs; Moon deposition, p. 10.)

2. With the passage of time, drilling and servicing of oil wells has been done at greater and greater depths. As a result, derrick structures of greater strength and accordingly greater weight were required. (Evidence; expert testimony, Affidavit of James Moon, p. 2, 3—9/12/52, file history of patent in suit.)

3. Conventional trucks were no longer suitable to carry the heavier derrick units. Not only were their structural characteristics insufficient, but the weight distribution was also unsuitable for engineering and legal reasons, the legal reasons being the necessity for compliance with the various highway codes of the various states. With the abandonment of conventional trucks, it became necessary to custom build the entire truck. In custom building, it was feasible and desirable from a weight distribution standpoint to reverse the positions of the various

components on the chassis in a manner such as to satisfy both the engineering and legal requirements for such structures. (Evidence; expert testimony, Affidavit of James Moon, p. 7, 8, 9—9/12/52 file history of patent in suit.)

4. Portable truck-mounted rear-erecting telescoping derricks were quite common at least two years prior to the application of Moon for the patent here in suit. So too, were the elevating mechanisms for erecting the derricks and extending and retracting the telescopic sections (Carl White Patent No. 2,204,713).

5. Prior to June, 1947, defendants' predecessor, Franks Manufacturing Corp., had made and sold portable servicing rigs including the following elements:

- (a) telescoping derricks
- (b) chassis having front and rear wheels [63]
- (c) hydraulic jacks arranged through hinge connections to raise and lower the derrick
- (d) hinge connection between chassis and derrick
- (e) engines mounted on the chassis for propelling the chassis, drawing and lowering the derrick, and operating the hoist on the derrick
- (f) driver's cab and motive power controls mounted on the chassis
- (g) auxiliary jacks disposed on the chassis between front and rear wheels for transferring loads to the ground.

Source: Catalogs and testimony of Woody.

6. Most of the truck-mounted, portable masts or derricks constructed prior to World War II were built upon so-called standard truck chassis; that is, chassis which were available from standard truck manufacturers and which required certain modification or reinforcement to carry the portable derricks. (Evidence; expert testimony.) (Moon deposition, p. 15.)

7. Only mechanical skill was needed to strengthen the chassis and redistribute certain components of known front-erecting pole masts and to substitute a derrick for the pole mast of such structures to produce the front-erecting portable derrick of the alleged invention of Moon. (Expert testimony.)

8. Prior to June 28, 1947, that is, prior to one year before the filing of the application for the patent in suit, Waldrip Engineering Company published or caused to be published product announcements of a self-propelled portable derrick in the following:

“Oil Weekly,” May 5, 1947

“Oil and Gas Journal,” May 10, 1947.

9. Waldrip Engineering Company also published or caused to be published advertisements of a self-propelled, front-erecting, [64] portable derrick in the following:

“The Petroleum Engineer,” April, 1947

“The Petroleum Engineer,” May, 1947

“The Petroleum Engineer,” June, 1947

“Oil,” April 24, 1947.

In both of the advertisements in "The Petroleum Engineer" of April, 1947 and May, 1947, the following statements were made: "The Waldrip 321—the only self-propelled servicing and drilling rig that drives into location Nose First." In both advertisements, pictures of the "servicing and drilling rig" in unerected and erected states are included. In the illustration of the derrick as erected, the rear legs of the derrick straddle the driver's position and the hinge about which the derrick swings is above the driver's head. (Stipulation and publications.)

From the pictures and description in the various publications and product announcements cited above, it is clear that the unit is a self-propelled truck including a chassis, and front and rear wheels. The unit also includes a driver's position inasmuch as a cab and steering wheel are shown. Furthermore, a telescopic derrick is mentioned in the description and is illustrated particularly well in the advertisements in the "Petroleum Engineer." The fact that the telescopic derrick is pivotally mounted is made plain from the showing of the derrick in a horizontal position and also in an erected position, with the hinge point of the derrick being in the same position relative to the cab of the unit in both the recumbent and in the erected position of the derrick. It is also clear from the advertisements in the "Petroleum Engineer" that the derrick has four legs and that a hydraulic ram is used for raising and lowering the derrick. The ram is shown in its retracted position in the illustration of the recumbent derrick and in its extended [65] position in the

illustration of the erected derrick. The hinged connection of the hydraulic ram to the derrick and to the chassis is obvious by virtue of the connection of the ram to the derrick in both the erected and recumbent positions of the derrick. The illustration of the derrick in the erected position clearly shows the legs straddling the driver's position. (Evidence; publications listed above, expert testimony.)

10. A valid patent may not be obtained if "the invention was patented or described in a printed publication in this or a foreign country or in public use, or on sale in this country, more than one year prior to the date of application for patent in the United States," 35 U.S.C. 102.

11. To a person skilled in the art relating to oil well drilling and servicing equipment the text and pictures in the announcements and advertisements published by Waldrip Engineering Company in April, May and June of 1947 convey information sufficient to enable such person to make and use equipment substantially identical to that disclosed in the Moon patent in suit. (Testimony of Woody, Purdom and another.)

12. Waldrip Engineering Company did not experience commercial success in exploiting Mr. Moon's designs. (Moon deposition.)

13. Defendants manufacture currently

1. Telescopic derricks with rear erection back-in arrangement including engine in front,—“Rocket” —“Comet”

2. Pole mast, truck mounted units, rear-erection, back-in arrangement with engine in front—"Cruiser"

3. Telescoping derricks with front erection drive-in arrangement including engine in rear—"Clipper."

Source: Franks catalogs 1955, 6 and 7.

14. Defendants have never sold in any year more drive-in than back-in units. Source: Testimony of Woody. [66]

15. Drive-in units, front erecting, engine in rear (Clipper) are more expensive to manufacture than back-in units. Source: Testimony of Woody.

16. Defendants have never made a unit in which a derrick hinged about a point over the head of the driver. (Testimony of Woody.)

17. Defendants have never made a unit in which a derrick was mounted for erection on a chassis in such fashion that the legs of the erected derrick straddled the cab or driver's position. Source: Testimony of Woody.

18. Defendants did not copy any unit or design of plaintiffs', but designed all equipment independently. Source: Testimony of Woody.

19. On June 28, 1948, Moon filed an application for patent in which he originally claimed broadly a front-erecting portable, truck-mounted derrick. (Evidence; file wrapper of application No. 35,666 which resulted in Patent No. 2,671,537, the patent here in suit.)

20. The Patent Office declined to grant claims

of such breadth, stating that it required no invention merely to reverse the location of components of known rear-erecting portable derricks to provide a front-erecting portable derrick. The patent in suit, however, was granted to Moon on a particular type of front-erecting portable derrick. The claims of the patent as issued cover a front-erecting portable truck-mounted derrick in which the rear legs of the derrick when erected straddle the driver's position; that is, the hinge point of the derrick is immediately above the driver's head. This feature presumably has the virtue of permitting the driver to look up within the derrick when it is in operation from a position within the derrick and furthermore permits the driver of the truck on which the derrick is mounted to spot the derrick with some degree of accuracy when [67] the derrick is driven onto a well location. (Evidence; file wrapper of United States Patent No. 2,671,537, the patent in suit; testimony of James Moon.)

21. Defendants have never made or sold a unit in which the driver was within the confines of the derrick legs; in defendants' unit the legs were either at the rear of the driver (at the rear of the vehicle) or entirely in front of the driver (at the extreme front end of the vehicle).

Dated this 27th day of February, 1958.

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Defendant. [68]

Acknowledgment of Service Attached. [69]

[Endorsed]: Filed February 27, 1958.

PLAINTIFFS' EXHIBIT No. 101

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

I.

The parties to this action are James Moon, Edmond M. Wagner and Philip Subkow, owners of the patent by mesne assignment. The defendants are Cabot Shops, Inc., a Massachusetts corporation, and Howard Supply Company, a California corporation. The pleadings are a Complaint filed February 27, 1957, as amended by Stipulation and Order dated January 3, 1958, and an Answer served March 29, 1957, which Answer by said Stipulation and Order constitutes the Answer to said Complaint as amended.

II.

Federal jurisdiction is invoked on the ground that this is an action for infringement of the patent under the Patent Laws of the United States, Title 35 U.S.C. and under Title 28 U.S.C., Section 1338(a).

III.

The following facts are admitted, and require no proof: [77]

1. United States Letters Patent 2,671,537 was issued to James Moon on March 9, 1954, as assignor to Western Oil Tool & Engineering Co., Inc., a California corporation, as assignee.

2. Said James Moon is a plaintiff in this action

Plaintiffs' Exhibit No. 101—(Continued)
and is also named Cleon James Moon, and the allegations of Paragraph I of the Complaint are true.

3. Plaintiffs are jointly the owners of said patent and that, except as stated in the following, the allegations of Paragraph II of the Complaint are true, except that defendants do not admit, but instead deny, that said patent was either duly or legally issued.

4. Plaintiffs by assignment in writing from Western Oil Tool & Engineering Co., Inc. have all of said corporation's right to collect damages for past infringement of said patent.

5. Plaintiffs did prior to December 27, 1957, notify defendant Howard Supply Company of their said alleged infringement of said patent, to wit, on or about November 8, 1956, and did notify defendant Cabot Shops, Inc., on August 17, 1955, and again on April 24, 1956, by letter in writing.

6. Franks Manufacturing Corporation was prior to the 5th day of April 1955 an Oklahoma corporation and had its principal offices at Tulsa, Oklahoma and a legal and established place of business in the southern district of California from and after March 9, 1954 until said 5th day of April 1955.

7. On or about said 5th day of April 1955 said Franks Manufacturing Corporation did merge with the Cabot Shops, Inc., a Massachusetts corporation, and that the merged corporations, the defendant in

Plaintiffs' Exhibit No. 101—(Continued)

the herein action, has continued the business of said Franks Manufacturing Corporation, through the Franks Division of said Cabot Shops, Inc., and has maintained since said 5th day of April 1955 and does now maintain a regular and established place of business in Tulsa, Oklahoma, and in Los Angeles County, [78] State of California, within said southern district of California.

8. The defendant herein did on February 24, 1956 sell to the Union Oil Company of California, within the southern district of California, a Super Senior Clipper Drive-In Vehicle, serial number 1861, and that the defendant and its predecessor corporation, the Franks Manufacturing Corporation, did subsequent to March 9, 1954 and prior to the bringing of this action, sell within the United States, including said sale to said Union Oil Company, sixteen (16) Clipper Drive-In units, to wit: one (1) Midget Clipper, advertised at page 1810 of the 1956 Catalog of defendant Cabot Shops, Inc., five (5) Senior Clippers, advertised at page 1885 of the 1957 Catalog of said defendant, four (4) Super Senior Clippers, advertised at page 1884 of said 1957 Catalog, and six (6) Giant Clippers, advertised at page 1883 of said Catalog.

9. Defendant has acquired all the liabilities of said Franks Manufacturing Corporation, an Oklahoma corporation, and

10. Defendant does not claim any ownership or any part of the right, title and interest in or to said

Plaintiffs' Exhibit No. 101—(Continued)

Letters Patent 2,671,537, or in or to the inventions and discovery secured thereby, nor any shop right, or any other right or license thereunder or thereto.

11. Mr. Wayland B. Woody gave and duly executed his deposition in Tulsa, Oklahoma, in June 1957 when called by plaintiffs and also at the same place and time gave a separate deposition for defendants upon stipulation; both said depositions are bound in one volume and on file in this Court; and said Wayland B. Woody, prior to aforesaid merger, was an officer of said Franks Manufacturing Corporation and since said merger has been at all times and now is a managing agent of defendant.

12. The Statement of Facts, appearing in only the following portion of Plaintiffs' Pre-Trial Statement of Facts, on file in this case and herein incorporated by this reference to the [79] extent herein specified; Statements appearing in Paragraphs 2 and all its subdivisions, 3 and all its subdivisions, 4(a), 5(a), (b), and (c), 8, 13(a) and (b), 14(a) and (b), 16 and all its subdivisions, 17, 21(a), 24(a), 48(a) and (b), 49 and all its subdivisions, 50(a), (b), (d) and (e), 52(a) and (d) and all subdivisions of (d), 53 and all its subdivisions, 54(a), 55, including A, B, C, D, H, I, J, L and subdivisions (a), (b), (c) and (d), and 58.

16. Conventional trucks as used in the construction of back-in units in which the derrick was carried to be hinged on the rear of the vehicle were not suitable to carry heavier derricks of the tele-

Plaintiffs' Exhibit No. 101—(Continued)

scopic type. Not only were their structural characteristics insufficient, but the weight distribution was also unsuitable for engineering and legal reasons; the legal reasons being the necessity for compliance with the various highway codes of the various states. In building the drive-in units in which the derrick is hinged at the front of the truck it became feasible to custom build the unit to obtain a weight distribution which would be desirable and which would satisfy both engineering and legal requirements for such structure.

17. The statement of facts appearing in the following portions only of the defendants' Pre-Trial Opening Statement on file in this Court, to wit: Paragraphs 4, 6 and 8, which are hereby incorporated by this reference.

18. Waldrip Engineering Company also published or caused to be published advertisements for a drive-in unit in the *Petroleum Engineer* of April, May and June, 1947, and in *Oil* of April 24, 1947.

19. The cost of construction of the Clipper Drive-In Units to Cabot Shops, Inc. is higher than the cost of manufacture of "Rocket" back-in units of comparable size and horsepower and other comparable specifications. [80]

IV.

Reservations as to the facts recited in Paragraph III above—None.

V.

The following facts, though not admitted, are not

Plaintiffs' Exhibit No. 101—(Continued)
to be contested at the trial by evidence to the contrary—None.

VI.

The following issues of fact, and no others, remain to be litigated upon the trial.

(a) All of the facts stated in Plaintiffs' Pre-Trial Statement of Facts and in Defendants' Pre-Trial Opening Statement not admitted to be true under Paragraph III of this Order; and

(b) The issues of facts corresponding to the issues of law set forth in Paragraph VIII.

VII.

The exhibits to be offered at the trial are as follows:

(a) List of Plaintiffs' documents and things intended to be offered by Plaintiffs, other than those to be used for impeachment, are hereto attached as Appendix A and made a part hereof by reference.

(b) All documents and things intended to be offered at the trial by defendants, other than those to be used for impeachment, are listed in Appendix B hereto attached and incorporated herein by this reference.

VIII.

The following issues of law, and no others, remain to be litigated upon the trial:

1. (a) Was the invention, claimed in the claims of the patent in suit, patented or described in any printed publication, cited by defendant Cabot Shops, Inc. in its answer to Plaintiffs' Interroga-

Plaintiffs' Exhibit No. 101—(Continued)

tories, before the invention thereof by James Moon?

(b) Was the invention patented or described in a printed publication in this country, cited by said Defendant in its answers to Plaintiffs' Interrogatories, more than one year prior to the filing of the application for the patent in suit?

2. If the invention of the patent in suit is not identically disclosed in any of the aforesaid patents and patent publications, as referred to in Paragraph 1, subparagraphs (a) and (b) above, is the difference between the subject matter sought to be patented by said patent and the said patents and publications such that the subject matter as a whole would have been obvious at the time the invention was made to persons having ordinary skill in the art to which said subject matter pertains?

3. Does the equipment as illustrated in the 1956 Catalog of defendant Cabot Shops, Inc., at page 1810 and in the 1957 Catalog at pages 1883, 1884 and 1885, and manufactured and sold by said defendant and its predecessor, Franks Manufacturing Corporation, constitute an infringement of the claims of the patent in suit?

4. Has the defendant Howard Supply Company infringed the patent in suit by sale of any of the foregoing equipment?

IX.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be

Plaintiffs' Exhibit No. 101—(Continued)
litigated, this order shall supplement the pleadings
and govern the course of the trial of this cause, un-
less modified to prevent manifest injustice.

Dated: March 3, 1958.

/s/ WM. C. MATHES,
United States District Judge.

Approved as to form and content:

/s/ PHILIP SUBKOW,
Attorney for Plaintiffs.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendants. [82]

APPENDIX A

List of Plaintiffs' Exhibits

Wherever the reference Woody appears in the
column "Former Identification," it means the num-
bered Exhibit as introduced in connection with the
deposition given by Mr. Wayland B. Woody on
notice by Plaintiffs in Tulsa, June, 1957. Franks
means Franks Manufacturing Corporation.

Pre-Trial Exhibit 1—Name: Moon Patent 2,671,-
537.

2—Date of Exhibit: 6/24/48; Assignment Moon
to Western Oil Tool & Engineering Co., Inc.

3—2/25/55; Assignment Western Oil Tool & En-
gineering Co., Inc. to Moon and Wagner.

4—3/2/55; Assignment Moon and Wagner to
Philip Subkow.

Plaintiffs' Exhibit No. 101—(Continued)

5—3/1/56; Confirmation of right to recover for past infringements to Moon and Wagner by Western Oil Tool Engineering Co., Inc.

6—3/1/56; Confirmation of right to recover for past infringements to Subkow by Moon and Wagner.

7—1/25/57; Assignment of additional 2/15 parts to Subkow.

8—1957; Page 1390, Fred E. Cooper, Inc. 1957 Catalog.

9—1948; Page 203, Vol. 1 Composite Catalog of Oil Field and Pipe Line Equipment (1948, 16th Ed.).

10—1957; Page 1406, Fred E. Cooper, Inc. 1957 Catalog.

11—1948; Pages 1346 and 1347 of Vol. 1 of Composite Catalog of Ex. 9.

12—11/1948; Reprint A.S.M.E. article entitled "Portable Oil-Well Drilling and Servicing Equipment" by James Moon.

13—Photo of Details Franks Service Unit.

14—Photo—Same Unit Erecting.

15—1948; Pages 1349-1352 inclusive of vol. 1 of Catalog Ex. 9.

16—Photograph of Franks Back-In Unit—side view; Former Identification: Woody Ex. 43. [83]

17—Photograph of Franks Back-In Unit Erected; (Woody Ex. 44).

18—1937; Early Franks Back-In Unit using Hydraulic Jack; (Woody Ex. 42).

19—Photo of similar Unit; (Woody Ex. 42).

Plaintiffs' Exhibit No. 101—(Continued)

20—1938; White Patent 2,204,713; (Moon Affidavit, Ex. 15, Woody Ex. 37).

21—Woody Patent 2,204,716.

22—1942; Franks Catalog No. 42; (Woody Ex. 40).

23—Franks Drawing Rocket TD Assembly 39; (Woody Ex. 12).

24—Franks Assembly Dwg. 50; (Woody Ex. 13).

25—Page 10—1940 Franks Catalog; (Woody Ex. 45).

26—Franks Bulletin No. 114.

27—Moon Patent 2,240,852; (Woody Ex. 47).

28—12/20/47; Article—Shell Designs New Portable Electric Rig.

29—Waldrip 911 Catalog.

30—6/3/44; Moon's drawing.

31—11/5/45; Screw Lift Drive-In.

32—1/1952; Moon Patent 2,583,958; (Moon Affd. Ex. 2).

32-a—12/15/53; Moon Patent 2,662,797.

32-b—Moon Appln. Serial 10,412, filed Feb. 24, 1948.

33—9/20/46; Two-page letter Woody-White; (Woody Ex. 49-49a.)

34—12/12/46; Large drawing 321 Model.

35—12/12/46; Reduction of same.

36—1/14/47; F-321-2901—Main Chassis Assembly.

37—2/5/47; F-321-4503—Side Elevation.

38—2/8/47; E-902-4707—Derrick Raising Load.

39—2/15/47; E-902-4701—Origin of Loads.

Plaintiffs' Exhibit No. 101—(Continued)

40—2/17/47; E-902-4703—Stress Analysis No.

2. [84]

41—2/17/47; E-902-4702—Stress Analysis No. 1.

42—2/18/47; F-300-100—Assembly 300 Main

Drum.

43—2/19/47; E-902-4704—Graphical Force Diagram No. 3.

44—2/20/47; E-902-4705—Stress Analysis No. 4.

45—2/21/47; E-902-4706—Load Summary.

46—3/10/47; F-902-300—Upper Section of Derrick.

47—5/15/47; F-300-4501—Dimensional layout 300 Main Drum.

48—7/7/47; G-902-100—Lower Section of Derrick.

49—7/17/47; G-300-1150—Cylinder Assembly.

50—Un-dated Drawing—Side View of Sliding Derrick.

51—11/14/47—F-321-2900—Main Chassis Assembly.

52—12/10/47; F-321-4519—I. H. Axle Assembly.

53—1/1948; 321-4528—Side Elevation.

54—Book of Engineering Releases.

55—Abstract of same.

56—Status of Production—3 sheets and 2 drawings and 2 photos 321-1.

57—Status of Production—321-2, 3 sheets.

58—Status of Production—3 sheets, 421-1.

59—3/22/48; Weight Analysis—321-2, 4 pages.

60—3/22/48; Weight Analysis—421-1, 5 pages.

61—4/1/48; Weight Analysis—5 pages.

Plaintiffs' Exhibit No. 101—(Continued)

62—4/29/48; Weight Analysis—1 sheet, 321-3, 421-2. [85]

63—321-421 Waldrip Catalog; (Ex. 4 Moon Affd., Woody Ex. 34).

64—Photograph 321-1.

65—Photograph 321-1 Latch.

66—Photograph 321-1 partially raised.

67—Photograph 321-1, plan view—top removed.

68—Photograph 321-1, side view—top removed.

69—Photograph—Waldrip 421 Unit; (Moon Affd. Ex. 5).

70—Photograph—Waldrip Drive-In; (Moon Affd. Ex. 6).

71—Photograph front end of Waldrip Drive-In Unit; (Moon Affd. Ex. 7).

72—Photograph of Waldrip Drive-In Unit erected.

73—4/19/47; Advertisement, Petroleum Engineer front sheet.

74—4/24/47; Advertisement, Oil.

75—4/5/47; Advertisement, Oil Weekly; (Kenway Affd., Woody Ex. 36).

76—5/10/47; Advertisement, Oil & Gas Journal; (Kenway Affd., Woody Ex. 38).

77—2/1949; Waldrip Wildcatter; (Moon Dep. Ex. 9, Woody Ex. 35).

78—6/19/47; Advertisement, Petroleum Engineer.

79—Waldrip Brochure; (Moon Deposition Ex. 8).

80—Waldrip 1948 Catalog; (Moon Affd. Ex. 12).

81—Waldrip 1949 Catalog; (Moon Affd. Ex. 13).

Plaintiffs' Exhibit No. 101—(Continued)

82—Print p. 3—1939 Franks Catalog; (Woody Ex. 33).

83—Print of page 11 of Franks 1942 Catalog; (Woody Ex. 39).

84—Photograph of drawing of Dart Unit; (Woody Ex. 19). [86]

85—Catalog page 1883 of 1957 Catalog—Giant Clipper; (Woody Ex. 1).

86—9/3/50; Franks Drawing 100-075; (Woody Ex. 3).

87—Reduced Print of Ex. 86.

88—10/18/55; Drawing Clipper 65-44, Assembly 94-A; (Woody Ex. 7).

89—Drawing Clipper 65-44, Assembly 117X; (Woody Ex. 8).

90—5/21/56; Drawing Clipper 137-65, Assembly 113; (Woody Ex. 11).

91—Drawing showing Hinge details; (Woody Ex. 23).

92—Reduced Print of Exhibit 91.

93—9/1/53; Drawing Outrigger details—Dwg. 21988; (Woody Ex. 24).

94—Reduced Print of Exhibit 93.

95—Page 1886 of 1957 Catalog; (Woody Ex. 1).

96—Photograph Clipper Unit—road position; (Woody Ex. 26).

97—Photograph Clipper erected but not extended; (Woody Ex. 30).

98—Photograph of Unit shown in Exhibit 85; (Woody Ex. 32).

Plaintiffs' Exhibit No. 101—(Continued)

99—Photograph of Clipper, Terminal Drilling & Production Co. front end and side.

100—Photograph of Clipper (same as 99) rear end.

101—Page 1884 of 1957 Cabot Catalog showing Super Senior Clipper; (Woody Ex. 1).

102—1/19/55; Drawing 41-129 (Senior Clipper); (Woody Ex. 4).

102a—Reduction of drawing 41-129 (Senior Clipper).

103—6/1/55; Drawing Clipper 44 (Assembly 25A); (Woody Ex. 5).

104—4/30/56; Drawing Clipper 44DD (Assembly 109); (Woody Ex. 6).

105—7/8/55; Drawing Clipper 658DD (Assembly 48); (Woody Ex. 9).

106—4/6/56; Drawing Clipper 658-65 (Assembly 103); (Woody Ex. 10). [87]

107—Super Senior Clipper; (Woody Ex. 14).

108—Photograph Super Senior Clipper; (Woody Ex. 27).

109—Photograph of front end of Ex. 108; (Woody Ex. 28).

110—Photograph of Ex. 108, Derrick erected; (Woody Ex. 31).

111—Catalog sheet Franks Midget Clipper; (Woody Ex. 15).

112—Page 1810 of 1956 Cabot Catalog; (Woody Ex. 2).

113—Photograph of Midget Clipper; (Woody Ex. 16).

Plaintiffs' Exhibit No. 101—(Continued)

114—Photograph—Another view of Midget Clipper (Ex. 113); (Woody Ex. 17).

115—Photograph of Super Senior Clipper (Ex. 101); (Woody Ex. 18).

116—7/10/54; Drawing Midget Clipper; (Woody Ex. 20).

117—Drawing 99-005; (Woody Ex. 21).

118—Drawing 99-006; (Woody Ex. 22).

119—8/26/55; Drawing 27482; (Woody Ex. 25).

120—Page 1882 of Cabot Catalog 1957 "The Clipper"; (Woody Ex. 1).

121—Page 1804 of Cabot Catalog 1956 "Clipper"; (Woody Ex. 2).

122—Page 1806 of Cabot Catalog 1956 "Clipper"; (Woody Ex. 2).

123—Page 1809 of Cabot Catalog 1956; (Woody Ex. 2).

124—Front sheet Oil & Gas Journal; (Woody Ex. 48).

125—Page 21 of 1953 Franks Catalog; (Woody Ex. 46).

126—7/29/57; Advertisement, Jones & Laughlin Oil & Gas Journal.

127—Franks Clipper folder; (Woody Ex. 41).

128—Hopper 1957 Catalog.

129—Photograph of Hopper Unit road position.

130—Hopper Unit half erected. [88]

131—Hopper Unit erected.

132—IDECO Catalog No. 57, 1957.

133—Photograph IDECO Unit.

134—Wagner-Morehouse Catalog No. 57.

Plaintiffs' Exhibit No. 101—(Continued)

135—Above Deposition of Mr. Wayland B. Woody when called by Plaintiffs, and the exhibits forming a part thereof (note the deposition exhibits are also included in the above listed exhibits).

136—Defendants' answers to Interrogatories propounded by Plaintiffs.

APPENDIX B

List of Defendant's Exhibits

- A. Exhibit 1 to the Moon deposition.
- B. Exhibit 2 to the Moon deposition.
- C. Exhibit 3 to the Moon deposition.
- D. Exhibit 4 to the Moon deposition.
- E. Exhibit 5 to the Moon deposition.
- F. Exhibit 6 to the Moon deposition.
- G. Exhibit 7 to the Moon deposition.
- H. Exhibit 8 to the Moon deposition.
- I. Exhibit 9 to the Moon deposition.
- J. Exhibit 10 to the Moon deposition.
- K. Exhibit 11 to the Moon deposition.
- L. Exhibit 12 to the Moon deposition.
- M. Exhibit M—Oil & Gas Weekly.
- N. Exhibit N—Oil & Gas Journal.
- O. Exhibit O—Petroleum Engineer, June, 1947, Page 192.
- P. Exhibit P—Petroleum Engineer, May, 1947, Page 234.
- Q. Petroleum Engineer, April, 1947, The Cover.
- R. Oil, April 24, 1947 (a cut-out portion of the ads to be supplied by Mr. Subkow).

Plaintiffs' Exhibit No. 101—(Continued)

S. Book of prior art patents.

T. File wrapper of the patent in suit.

U. Deposition of Moon.

V. Moon affidavit and exhibits thereto filed in opposition to the motion for summary judgment.

W. Franks Catalog of 1939, Exhibit 33 to the deposition of Woody.

X. Model. [90]

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

ORDER

Defendants' motion to amend its answer having come on for hearing the 3rd day of March, 1958, and defendants having in open Court withdrawn said motion,

It Is Ordered that said motion be stricken from the records of this cause.

Dated: March 3rd, 1958.

/s/ WM. C. MATHES,

United States District Judge.

Approved As To Form:

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Defendants. [70]

Acknowledgment of Service Attached.

[Endorsed]: Filed March 7, 1958.

[Title of District Court and Cause.]

ORDER

This cause coming on to be heard on plaintiffs' motion for an order requiring defendant Howard Supply Company to answer interrogatories propounded by plaintiffs to defendants Howard Supply Company and Cabot Shops, Inc., and requiring defendant Cabot Shops, Inc. to answer certain interrogatories fully,

It Is Hereby Ordered that defendant Howard Supply Company shall serve and file not later than March 13, 1958, answers under oath to the interrogatories heretofore served by plaintiffs on defendants, and that defendant Cabot Shops, Inc. shall serve and file not later than March 13, 1958, further answers under oath to the said interrogatories, as follows: the interrogatory substituted by stipulation filed February 17, 1958, for the interrogatories numbered V, VI, VII and to [31] also further answer interrogatories numbered VIII, XIII, XV, XVIII, XX, XXI, XXIII and XXIV, and all parts thereof, said answers to be full answers to said interrogatories.

Dated: March 3, 1958.

/s/ WM. C. MATHES,

United States District Judge.

Approved As To Form:

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorney for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 7, 1958. [32]

PLAINTIFFS' EXHIBIT No. 105

[Title of District Court and Cause.]

ANSWERS OF DEFENDANT HOWARD SUPPLY COMPANY TO CERTAIN INTERROGATORIES

Comes Now the defendant, Howard Supply Company, and answers the following interrogatories of plaintiffs:

Interrogatory No. I:

Do the following drawings and catalogue pages each correctly show equipment manufactured or sold by defendant Howard Supply Co., defendant Cabot Shops, Inc., or by its predecessor, Franks Manufacturing Corporation, since March 9, 1954?

Answer:

(a) If as to any of the following catalogue pages the answer is in the affirmative, give the number of units of [33] such equipment so manufactured or sold by each defendant separately and the dates of sale or of manufacture if the same had not been sold, to wit:

1. The Midget Clipper shown at page 1810 of the 1956 Catalogue of defendant Cabot Shops, Inc.

Answer:

No. The defendant, Howard Supply Company, has not sold any of the accused devices.

2. The Giant Clipper shown at page 1883 of the 1957 Catalogue of defendant Cabot Shops, Inc.

Plaintiffs' Exhibit No. 105—(Continued)

Answer:

No.

3. The Super Senior Clipper shown at page 1884 of the 1957 Catalogue of defendant Cabot Shops, Inc.

Answer:

No.

4. The Senior Clipper shown at page 1885 of the 1957 Catalogue of Cabot Shops, Inc.

Answer:

No.

Interrogatory No. II:

Have defendants or either of them since March 9, 1954, manufactured or sold any equipment similar to any of the aforesaid equipment and not shown in any of the aforesaid Catalogue pages? If the answer is in the affirmative, designate the model name, model number, to whom the same was sold, where the same was sold and when the same was sold. If the answer to this Interrogatory II is in the affirmative, state whether the said models are shown in any of the exhibits introduced in connection with the [34] deposition of Mr. Wayland B. Woody taken in Tulsa, Oklahoma in June of 1957, and if so introduced identify the said exhibits by the exhibit number. If not so introduced, state whether defendants or either of them have in their possessions drawings, photographs, descriptive matter or printed matter, catalogues or advertisement showing the same.

Plaintiffs' Exhibit No. 105—(Continued)

Answer:

No.

Interrogatory No. III:

In connection with any of the aforesaid items identified in Interrogatory No. I, were any of the aforesaid sold within the Southern District of California since March 9, 1954? If the answer to the aforesaid interrogatory is in the affirmative, give the name of the purchaser and the date of the sale.

Answer:

No. [35]

Interrogatory No. XX:

State in what respect defendant claims that the Patent No. 2,671,537 was not either duly or legally issued, as alleged in Paragraph 2 of Defendants' Answer.

Answer:

Defendant, Howard Supply Company, has no information in this regard.

Interrogatory No. XXI:

State the date upon which it is alleged by defendants in Paragraph 5 of their Answer that the invention, identified by defendant as the "alleged invention" in said Paragraph 5, was made and state if defendant will rely on evidences other than those referred to in Paragraph 6 and 7 of the Answer to show the state of the art and, if so, state of what such evidences consist.

Plaintiffs' Exhibit No. 105—(Continued)

Answer:

Defendant, Howard Supply Company, has no information in this regard. [36]

Interrogatory No. XXIII:

Give the name, date, title and pages of the publications referred to in Paragraph 6 of the Defendants' Answer.

Answer:

Defendant, Howard Supply Company, has no information in this regard.

Interrogatory No. XXIV:

Give the numbers, dates and country issuing each of the patents referred to in Paragraph 6 of said Answer, which defendants will urge at the trial best disclose the material elements and combinations of elements as alleged in said Paragraph 6.

Answer:

Defendant, Howard Supply Company, has no information in this regard.

Interrogatory No. XXV:

Give the date and place of the public use referred to in Paragraph 7 of the Answer and the name of those making such use and the names of all witnesses known to defendants having knowledge of such use.

Answer:

Defendant, Howard Supply Company, has no information in this regard.

Plaintiffs' Exhibit No. 105—(Continued)

Interrogatory No. XXVI:

State when, where and by whom "Moon's invention was 'on sale'", as is alleged by defendants in their Motion to Amend their Answer set to be heard on February 10th. [37]

Answer:

Defendant, Howard Supply Company, has no information in this regard.

Interrogatory No. XXVII:

Have defendants or either of them any documents, drawings or correspondence relating to the placing on sale, as alleged in said Motion, and, if so, identify the same.

Answer:

No.

Dated this 10th day of March, 1958.

HOWARD SUPPLY
COMPANY,

/s/ By H. E. HOWARD, Jr.,
Secretary-Treasurer. [38]

Duly Verified. [39]

Acknowledgment of Service Attached. [40]

[Endorsed]: Filed March 21, 1958.

PLAINTIFFS' EXHIBIT No. 103

[Title of District Court and Cause.]

DEFENDANT'S FURTHER ANSWERS TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

Comes Now the defendant, Cabot Shops, Inc., and further answers certain of the interrogatories propounded by plaintiffs: Interrogatory substituted by stipulation for Interrogatories V, VI and VII.

Give for each model referred to in Interrogatory No. I and the model referred to in Interrogatory No. II sold by defendants or either of them the following information:

1. Did the Howard Supply Co. or the Franks Manufacturing Corporation, predecessor in business of defendant Cabot Shops, Inc., prior to the manufacture or sale by the Franks Manufacturing Corporation of any of the equipment referred to in Interrogatory I or Interrogatory II, manufacture or sell portable telescopic derricks such as or similar to those advertised by said Franks Manufacturing Corporation at pages 1349-1352, both inclusive [71] of Volume 1 of the Composite Catalog of Oil Field and Pipeline Equipment (1948-16th Edition)?

2. If the answer to the foregoing Interrogatory I is in the affirmative, give with respect to each of such equipment so sold:

(a) The model number thereof;

(b) The weight on the front wheels of the model

Plaintiffs' Exhibit No. 103—(Continued)

moving under its own power on the road, the number of such front wheels and the state or states to which the same were shipped, and the dates of each such shipment, unless the same has been previously identified, and

(c) The weight on the rear wheels of the model moving under its own power on the road, the number of such rear wheels and the state or states to which the same were shipped, and the dates of each such shipment, unless the same has been previously identified, and

(d) If the facts referred to in 2 above, a to c all inclusive, are unknown to defendants, give the total weight on the front and rear wheels of the model moving under its own power on the road, the number of such front and rear wheels and the state or states to which the same were shipped, and the dates of each such shipment, and

(e) The front overhang of the derrick in front of the bumper, if a bumper was used, or, if no bumper was used, in front of (a) the front end of the vehicle, (b) the forward most point of the front tires, and (c) the state to which each of so identified units were so shipped and the dates of such shipment.

Answer: Prior to March 20, 1958, defendants, Cabot Shops, Inc. and Franks Manufacturing Corporation, have sold back-in units similar to those specified in said interrogatory, which units, because of excess weight on the front and/or rear axles [72]

Plaintiffs' Exhibit No. 103—(Continued)
and wheels and the front overhang, did and do not comply with the laws of California, Oklahoma and Texas, and do require special permission for moving. Because there were no scales available prior to 1942, it cannot definitely be ascertained whether units sold prior to 1942 did and do fail to comply with the laws of other states. Further answering said interrogatory, Cabot Shops, Inc. and Franks Manufacturing Corporation have manufactured drive-in units which likewise fail to comply with the highway laws of California, Oklahoma and Texas when customers add to the units delivered them the auxiliary equipment customarily employed upon such units.

Interrogatory No. XIII:

Has any officer or employee of Franks Manufacturing Corporation seen a 321 or a 421 Drive In unit manufactured by Waldrip Engineering Co.? If the answer is in the affirmative, give the name of such officer or employee and the date on which the same was first seen.

Answer: Further answering Interrogatory XIII, it is stated that Wayland B. Woody saw a Waldrip Drive In unit in about 1951, although he cannot be certain as to the date. Whether the unit seen by Mr. Woody was a 321 or a 421 model, he did not then know and does not now know; furthermore, Mr. Woody did not then know and does not now know whether the Waldrip Drive In unit he saw was either a 321 or a 421 model. Whether or not

Plaintiffs' Exhibit No. 103—(Continued)

Mr. Corey also saw such a unit in about 1951 is unknown.

Interrogatory No. XV:

Prior to the design of the first Clipper unit by Franks Manufacturing Corporation did any officer or employee of Franks Manufacturing Corporation see any drawings, photographs, catalogues of the Drive In unit manufactured by Waldrip Engineering Co? If the answer is in the affirmative, give the date when any thereof was first seen and identify the same if the same forms any exhibit introduced in connection with the aforesaid depositions of [73] Mr. Woody or Mr. Moon.

Answer: Further answering Interrogatory XV, Mr. Woody has definitely seen the Waldrip Wild Catter but has no present recollection as to when he first saw it.

Interrogatory No. XVIII:

Did the Franks Manufacturing Corporation sell to the Richfield Oil Company in California a portable telescopic derrick mounted on a motor vehicle in which the engine was placed behind the cab? If the answer to this interrogatory is in the affirmative, give the model number, date of sale and place of delivery of such unit. If the said unit is shown in any of the catalogue pages referred to in Interrogatory No. I, identify the model to which said unit corresponds. If the said unit is not shown in any of the aforesaid catalogue pages, do defendants or

Plaintiffs' Exhibit No. 103—(Continued)

either of them have in their possession or under their control drawings, photographs or other representations of said equipment?

Answer: Further answering Interrogatory XVIII, defendants now are informed that plaintiffs' interrogatory was not directed to the sale of a drive in unit. Franks Manufacturing Corporation did sell Richfield Oil Company in California a portable telescopic derrick mounted on a trailer connected to a White tractor, there being an engine mounted adjacent the forward end of the trailer. There was also an engine for propelling the tractor mounted adjacent the forward end of the tractor. The unit was known as "Model 90' Trailer Telescoper Serial 882." It was sold in 1942 and delivered in California. The said unit is not shown in any catalogue page referred to in Interrogatory No. I. Defendants have in their possession drawings and photographs of said equipment, which drawings and photographs were displayed to counsel for plaintiffs, Philip Subkow, March 20, 1958.

Interrogatory No. XX:

State in what respect defendant claims that the Patent [74] No. 2,671,537 was not either duly or legally issued, as alleged in Paragraph 2 of Defendants' Answer.

Answer: Further answering Interrogatory XX, defendants' contentions are set forth in the pretrial conference order.

Plaintiffs' Exhibit No. 103—(Continued)

Interrogatory No. XXI:

State the date upon which it is alleged by defendants in Paragraph 5 of their Answer that the invention, identified by defendant as the "alleged invention" in said Paragraph 5, was made and state if defendant will rely on evidences other than those referred to in Paragraphs 6 and 7 of the Answer to show the state of the art and, if so, state of what such evidences consist.

Interrogatory No. XXII:

State what part or parts of the invention or improvement referred to in Paragraph 5 of the Answer does not embody substantial variations of changes from that which belong to the state of the art as it existed at the time of the alleged inventions thereof, as alleged in Paragraph 5 of Defendants' Answer.

Interrogatory No. XXIII:

Give the name, date, title and pages of the publications referred to in Paragraph 6 of the Defendants' Answer.

Answer: Further answering Interrogatories XXI, XXII and XXIII, the evidence to be relied upon by defendant, Cabot Shops, Inc., as to prior art will consist of the patents and publications, copies of which appear in connection with Exhibits M, N, O, P, Q, R, S and T. Defendants accept December 16, 1946 as the date upon which Mr. James Moon made the alleged invention of the patent in suit.

Plaintiffs' Exhibit No. 103—(Continued)
Interrogatory No. XXIV:

Give the numbers, dates and country issuing each of the patents referred to in Paragraph 6 of said Answer, which defendants will urge at the trial best disclose the material elements and combinations of elements as alleged in said Paragraph 6.

Answer: Further answering Interrogatory XXIV, defendants are currently of the opinion that the patents to Morton and Evans, copies of which appear in Exhibit S, are the best patent references.

CABOT SHOPS, INC.,
/s/ By WAYLAND B. WOODY,
Chief Engineer.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 21, 1958. [75]

PLAINTIFFS' EXHIBIT No. 104

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by and between the parties hereto, through their respective counsel, that Howard Supply Company may, through its counsel, adopt the answers of Cabot Shops, Inc. to interrogatories propounded by plaintiffs modified by the stipulation of February 17, 1958 and not answered by Howard in its answers dated March 10, 1958, when answered by the defendant, Cabot Shops Inc., and that upon

Plaintiffs' Exhibit No. 104—(Continued)
said adoption by defendant, Howard Supply Company, through and by its counsel, said answers shall be deemed to have been made by said defendant, Howard Supply Company, and under oath.

Dated this 12th day of March, 1958.

/s/ PHILIP SUBKOW,
In Propria Persona,
Attorney for Plaintiffs.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendants.

Approved March 25, 1958.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed March 25, 1958. [41]

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 289-57-WM

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW, Plaintiffs.

vs.

CABOT SHOPS, INC., et al., Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This Cause coming on to be heard, and the plaintiffs and defendants having offered evidence, both documentary and oral, and the Court being fully advised hereby enters the following findings of fact, conclusions of law and judgment.

Findings of Fact

1. By this action, plaintiffs James Moon, Edmond M. Wagner and Philip Subkow, joint owners of United States Letters Patent No. 2,671,537 seek, against defendants Cabot Shops, Inc. and Howard Supply Company, an injunction and damages by reason of the alleged infringement by the defendants.

2. The Court adopts as the findings of fact each statement admitted to be true in the Pretrial Conference Order entered [91] March 3, 1958, Item III, 1 through 19, including each statement of fact referred to in Item III (12) as fully as if each such statement were set forth verbatim herein.

3. Mr. Moon made the invention claimed by the patent in suit December 12, 1946.

4. The invention claimed in the claims of the patent in suit was not patented or described in any printed publication (Exhibits M through T, both inclusive) cited by the defendant Cabot Shops, Inc. in its Answers to Plaintiffs' Interrogatories No. XIII, dated March 20, 1958 and filed March 21, 1958.

5. It does not clearly appear from the evidence that the devices described in the printed publications embody the invention of the patent in suit, the details not being apparent from the advertisements (Exhibits M through R).

6. The invention of the patent in suit was not patented or described in a printed publication cited by the defendant Cabot Shops, Inc. in its Answers to Plaintiffs' Interrogatories as set forth in Finding No. 4 more than one year prior to the filing of the application for the patent in suit.

7. The application of the patent in suit does not contain any caveat on the face of the issued Letters Patent giving notice of any claim to any filing date earlier than the filing date of the patent in suit.

8. Mr. Moon filed on February 24, 1948 an application for Letters Patent, Exhibit 46.

9. The invention described in the patent represents an inventive advance over the prior art.

10. The defendants' drive-in units are correctly shown at page 1810 of Exhibit 55 and pages 1883, 1884 and 1885 of Exhibit 54 and in Exhibits 57, 59, 93, 94 and 95.

11. Said drive-in units referred to in Finding No. 10 do not infringe the claims of the patent in [92] suit.

Conclusions of Law

1. The plaintiffs are the owners of the patent in suit.

2. The patent in suit and each claim thereof is good and valid in law.

3. Plaintiffs are not entitled to carry the effective filing date of the patent in suit to February 24, 1948, the filing date of the application Exhibit 46.

4. In view of the state of the prior art the scope of the invention should be closely limited and so that the claims are entitled to a very narrow range of equivalents and the said range of equivalents does not include the accused devices of defendants.

5. None of the claims of the patent in suit are infringed by the drive-in units referred to in Finding of Fact No. 10.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Adjudged and Decreed:

1. The patent in suit and each of the claims thereof is good and valid in law.

2. None of the claims of the patent in suit have been infringed by defendants.

3. The complaint herein be and the same is hereby dismissed, and plaintiffs shall take nothing thereby.

4. Each party shall bear its own costs, and there shall be no award of attorneys' fees.

Dated at Los Angeles, California this 7th day [93]
of June, 1958.

/s/ WM. C. MATHES,

United States District Judge.

Disapproved as to form:

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Defendants. [94]

Acknowledgment of Service Attached.

[Endorsed]: Filed June 9, 1958. Entered June
10, 1958.

United States District Court
Southern District of California

Office of the Clerk, Room 231, U. S. Post Office &
Court House, Los Angeles 12, California

Lyon & Lyon, Esqs. 811 West 7th Street, Los An-
geles 17, Calif. Philip Subkow, Esq. 727 West
7th Street, Los Angeles 17, Calif.

RE: Moon, et al., vs. Cabot Shops, Inc., et al., No.
289-57-WM.

You are hereby notified that judgment in the
above-entitled case has been entered this day in the
docket.

Dated: June 10, 1958.

CLERK, U. S. District Court,
By C. A. SIMMONS,
Deputy Clerk. [95]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF
APPEALS FOR THE NINTH CIRCUIT

To the Clerk of the Above Entitled Court and To
The Defendants, Cabot Shops, Inc. and Howard
Supply Company, and To Charles G. Lyon,
Esq., of Lyon & Lyon, their attorneys:

Notice Is Hereby Given that James Moon, Ed-
mond M. Wagner and Philip Subkow, plaintiffs
above named, hereby appeal to the Court of Ap-
peals for the Ninth Circuit from the final Judg-
ment entered in this action on the 10th day of June,
1958, and particularly from that portion of the
Judgment as follows:

"2. None of the claims of the patent in suit have
been infringed by defendants.

"3. The complaint herein be and the same is
hereby dismissed, and plaintiffs shall take nothing
thereby. [96]

"4. Each party shall bear it own costs, and there
shall be no award of attorneys' fees."

Dated: June 27, 1958.

JAMES MOON,
EDMOND M. WAGNER,
PHILIP SUBKOW,
Appellants,

/s/ By PHILIP SUBKOW,

In Propria Persona and Attorney for Appellants,
James Moon and Edmond M. Wagner. [97]

Acknowledgment of Service Attached. [98]

[Endorsed]: Filed July 1, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and To
The Plaintiffs, James Moon, Edmond M. Wagner and Philip Subkow, and to Philip Subkow,
their attorney:

Notice Is Hereby Given that Cabot Shops, Inc. and Howard Supply Company, defendants herein, hereby cross appeal to the Court of Appeals For the Ninth Circuit from the judgment entered in this action on the 10th day of June, 1958, and particularly from that portion of the judgment as follows:

“1. The patent in suit and each of the [99] claims thereof is good and valid in law.

“4. Each party shall bear its own costs, and there shall be no award of attorneys’ fees.”

Dated at Los Angeles, California, this 3rd day of July, 1958.

CABOT SHOPS, INC. and
HOWARD SUPPLY
COMPANY,
Cross-Appellants,

LYON & LYON,
CHARLES G. LYON,

/s/ By CHARLES G. LYON,
Attorneys for Cross-Appellants.

Acknowledgment of Service Attached. [101]

[Endorsed]: Filed July 3, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75(a) F.R.C.P., Plaintiffs-Appellants, hereby designate for inclusion in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, taken by notice of appeal filed the 1st day of July, 1958, the following portions of the record, proceedings, testimony and evidence in this action:

Pleadings:

1. Original Complaint.
2. Answer to the original Complaint.
3. Stipulation for Amendment of Complaint, filed January 3, 1958, signed by Judge Harrison.
4. Defendants' Motion to Amend the Answer, filed January 3, 1958. [102]
5. Order entered March 3, 1958, striking Motion Item 4.
6. Answer of Defendant Cabot Shops, Inc., filed February 21, 1958, to Interrogatories Propounded by Plaintiffs (These Answers are in evidence as Exhibit 102).
7. Order directing Defendant Howard Supply Company to Answer Interrogatories Propounded by Plaintiffs and directing Defendant Cabot Shops to make further Answers, filed March 7, 1958.
8. Answer of Defendant Howard Supply Com-

pany, dated March 10, 1958, to Plaintiffs' Interrogatories (Exhibit 105).

9. Stipulation, dated March 12, 1958, for adoption by Howard Supply Company of the Answers of Defendant Cabot Shops, Inc. to Plaintiffs' Interrogatories (Exhibit 104).

10. Further Answer by Defendant Cabot Shops, Inc., filed March 21, 1958, to Interrogatories Propounded by Plaintiffs (Exhibit 103).

Pretrial:

11. Pretrial Conference Order, filed March 3, 1958 (Exhibit 101).

12. Plaintiffs' Pretrial Statement of Facts, filed February 26, 1958, incorporated in said Pretrial Conference Order by reference.

13. Defendants' Pretrial Opening Statement, filed February 27, 1958, referred to in said Pretrial Conference Order.

Judgment:

14. Findings of Fact, Conclusions of Law and Judgment [103] entered June 10, 1958.

15. Entry of Judgment.

16. Notice of entry of said Judgment, dated June 10, 1958.

17. Notice of Appeal by Plaintiffs, filed July 1, 1958.

18. This Designation.

19. Statement of Points on Appeal relied upon by Plaintiffs.

20. Order for forwarding of exhibits, transcript and record to the Appellate Court.

21. Certificate of Clerk.

22. Plaintiffs' Documentary Exhibits—Exhibits 1 through 21, both inclusive; 23 through 107, both inclusive.

23. Defendants' Documentary Exhibits—G; H; L through T, both inclusive; T-1; AA; AB; AC; AF; AG; AK.

24. Transcript of Proceedings:

Transcript of Proceedings of March 25, 1958:

* * * * * [104]

Transcript of Proceedings of March 26, 1958:

* * * * * [106]

Transcript of Proceedings of March 27, 1958:

* * * * * [107]

Transcript of Proceedings of March 28, 1958:

* * * * *

25. Woody Deposition (Exhibit 98):

* * * * * [108]

Dated: July 17, 1958.

/s/ PHILIP SUBKOW,

In Propria Persona and Attorney for Appellants,
James Moon and Edmond M. Wagner. [110]

Acknowledgment of Service Attached. [111]

[Endorsed]: Filed July 21, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON BY
PLAINTIFFS-APPELLANTS ON APPEAL

1. The Court erred in finding that the defendants' drive-in units do not infringe the claims of the patent in suit.

2. The Court erred in concluding that in view of the state of the prior art the scope of the invention should be closely limited and so that the claims are entitled to a very narrow range of equivalents and the said range of equivalents does not include the accused devices of defendants.

3. The Court erred in concluding that none of the claims of the patent in suit are infringed by the drive-in units of defendants.

4. The Court erred in concluding that the plaintiffs are not entitled to carry the effective filing date of the patent in suit to February 24, 1948, the filing date of application of Serial No. 10,412 (Exhibit 46).

5. The Court erred in its judgment that (a) none [112] of the claims of the patent in suit have been infringed by defendants, (b) dismissing the complaint and (c) denying relief to plaintiffs.

/s/ PHILIP SUBKOW,

In Propria Persona and Attorney for Appellants,
James Moon and Edmond M. Wagner. [113]

Acknowledgment of Service Attached. [114]

[Endorsed]: Filed July 21, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD
ON APPEAL

In addition to the portions of the record designated by plaintiffs-appellants, defendants-cross-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, pursuant to the notice of appeal filed by defendants-cross-appellants July 3, 1958, the following portions of the record, proceedings, testimony and evidence in this action:

1. All portions of the transcript of proceedings of the trial March 25, 26, 27 and 28 omitted by plaintiffs-appellants' designation heretofore filed.
2. All exhibits offered by either plaintiffs or [115] defendants and received in evidence not designated in plaintiffs-appellants' designation.
3. This designation.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendants.

Acknowledgment of Service Attached. [116]

[Endorsed]: Filed July 25, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY
DEFENDANTS-CROSS-APPELLANTS

1. The Court erred in finding that the invention claimed in the claims of the patent in suit was not patented or described in any printed publication (Exhibits M through T, both inclusive) cited by the defendant Cabot Shops, Inc. in its Answers to Plaintiffs' Interrogatories No. XIII, dated March 20, 1958 and filed March 21, 1958.

2. The Court erred in finding that it does not clearly appear from the evidence that the devices described in the printed publications embody the invention of the patent in suit, the details not being apparent from the advertisements (Exhibits M through R).

3. The Court erred in finding that the invention of the patent in suit was not patented or described in a printed [117] publication cited by the defendant Cabot Shops, Inc. in its Answers to Plaintiffs' Interrogatories as set forth in Finding No. 4 more than one year prior to the filing of the application for the patent in suit.

4. The Court erred in finding that the invention described in the patent represents an inventive advance over the prior art.

5. The Court erred in finding that the defendants' drive-in units are correctly shown at page 1810 of Exhibit 55 and pages 1883, 1884 and 1885

of Exhibit 54 and in Exhibits 57, 59, 93, 94 and 95.

6. The Court erred in failing to find that each and every element of the claims of the patent in suit would be apparent to a person skilled in the art from the advertisements (Exhibits M through R) published by Waldrip more than one year prior to the filing of the application for the Letters Patent in suit.

7. The Court erred in concluding that the patent in suit and each claim thereof is good and valid in law.

8. The Court erred in failing to conclude that the Letters Patent in suit and each of the claims thereof are invalid and void under Title 35 U.S.C. Section 102 (b) as the invention was described in a printed publication in this country more than one year prior to the date of the application for patent in the United States.

9. The Court erred in adjudging that the patent in suit and each of the claims thereof are good and valid in law.

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Defendants. [118]

Acknowledgment of Service Attached. [119]

[Endorsed]: Filed July 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals, for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 119, inclusive, containing the original:

Complaint.

Answer.

Stipulation re amendment to complaint.

Notice of Motion and Motion to amend answer.

Defendant's Answers to interrogatories.

Order directing defendants to answer interrogatories.

Answers of Defendant Howard Supply Co. to certain interrogatories.

Stipulation re adoption of answers to interrogatories.

Plaintiffs' Pretrial Statement of Facts.

Defendants' Pretrial opening Statement.

Order, filed 3/7/58 striking defendants' motion to amend answer.

Defendant's further answers to interrogatories.

Pre-Trial Conference Order.

Findings of Fact, Conclusions of Law and Judgment.

Clerk's notice of entry of Judgment.

Notice of Appeal (Plaintiffs).

Notice of Appeal (Defendants).

Plaintiff's Designation of Record on Appeal.

Statement of Points relied on by Plaintiffs-Appellants.

Defendant's Designation of Record on appeal.

Statement of Points relied upon by Defendant-Appellants.

B. Five volumes of Reporter's Official Transcript of proceedings had on:

March 25, 1958 (Pages A to TT).

March 25, 1958 (Pages 1 to 94).

March 26, 1958.

March 27, 1958.

March 28, 1958.

C. Plaintiff's Exhibits:

1, 1-A, 2 to 21, inclusive, 23 to 107, inclusive.

Defendant's Exhibits:

A, C, to H, inclusive; J, L to T-1, inclusive; U, X, Y, AA, AB, AC, AF, AG, AH.

I further certify that my fee for preparing the foregoing record, amounting to \$2.00, has been paid by appellant.

Dated: August 5, 1958.

[Seal] JOHN A. CHILDRESS,

Clerk,

/s/ By WM. A. WHITE,

Deputy Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 289-57 WM

JAMES MOON, EDMOND M. WAGNER, and
PHILIP SUBKOW, Plaintiffs,

vs.

CABOT SHOPS, INC., a corporation, and CABOT
SHOPS, INC., dba FRANKS MANUFAC-
TURING COMPANY, HOWARD SUPPLY
COMPANY, a corporation, Defendants.

REPORTERS' TRANSCRIPT OF
PROCEEDINGS

(Partial)

Los Angeles, California

Tuesday, March 25, 1958, 9:30 a.m.

Honorable William C. Mathes, Judge presiding.

Appearances: For the Plaintiffs: Philip Subkow,
Esq., 626 Roosevelt Building, 727 West Seventh
Street, Los Angeles 17, California. For the Defend-
ants: Lyon & Lyon, by Charles G. Lyon, Esq., 811
West Seventh Street, Los Angeles 17, California;
and Kenway, Jenney, Witter & Hildreth, by Her-
bert P. Kenway, Esq. and George W. Crowley, Esq.,
24 School Street, Boston 8, Mass.; and Kenneth W.
Brown, Esq., 77 Franklin Street, Boston 10, Massa-
chusetts.

The Court: Are there any ex parte matters?

The Clerk: No ex parte matters, your Honor.

The Court: Call the calendar.

The Clerk: Case No. 289-57, James Moon, et al., versus Cabot Shops, Inc., et al.

Mr. Subkow: Ready for the plaintiff, your Honor.

Mr. Lyon: Ready for the defendant, your Honor.

At this time, if the court please——

The Court: How long will this case take? As you know, I wasn't expecting to hear this case.

Mr. Subkow: It was estimated at six days at the pretrial conference, your Honor.

The Court: Six days?

Mr. Lyon: Since that time, however, substantial issues have been removed from the case and the defendant estimates that the defendant's case will take one day. We can't see how the case would take over——

The Court: Well, I will try the issue of validity, first. How long will that take?

Mr. Subkow: The issue of validity?

The Court: Nothing but validity.

Mr. Subkow: I understand. I think that will not take more than a day or a day and a half. I suppose, including [A]* cross examination—well, the difficulty would be——

The Court: We won't have much cross examination. We'll dispense with cross examination.

* Page numbers appearing at top of page of Reporter's Transcript of Proceedings.

Mr. Subkow: I think I will read then only a portion of some depositions. I believe that that would be about right, a day or a day and a half.

The Court: Very well. Mark it ready.

Do you have something else you want to say at this time, Mr. Lyon?

Mr. Lyon: If we are proceeding, I wish to introduce associate counsel from Boston.

The Court: You may.

Mr. Lyon: If the court please, I would like at this time to introduce and move that they be recognized for the trial of this case Herbert P. Kenway, in the center; Mr. George W. Crowley at the end of the table; and Mr. Kenneth W. Brown, of the Bar of the State of Massachusetts in the Federal courts there. And I ask that they be recognized for the purpose of this case.

The Court: They will be admitted specially for the purpose of this case.

Mr. Lyon: And before there is any further chance for delay in calling the fact to Mr. Subkow's attention—though it has been called to his attention before—working here as we did, with me taking the laboring oar here in Los Angeles [B] but these gentlemen being in Boston and our witnesses coming from Pampa, Texas, an error crept into the admissions of fact, and I would like at this time, if the court please, to move——

The Court: Well, I haven't finished calling the calendar yet.

Mr. Lyon: Excuse me. I will sit down.

The Court: Proceed with the call, Mr. Clerk.

(Other court matters.)

The Court: You may proceed in Moon against Cabot Shops.

Mr. Lyon: As I was saying, your Honor, an error crept into the admissions, and it got there because of the fact that we were working at 3,000 mile legs of the triangle, and in plaintiff's pretrial statement of the case there is a statement, 49(a), which is just simply not true according to the facts as we receive them from our witness, and we would like to be relieved of having agreed to that.

The Court: Which document is it, Mr. Lyon?

Mr. Lyon: It's stated in Plaintiff's Pretrial Statement, and it is agreed to——

The Court: Filed what time?

Mr. Lyon: In the pretrial conference order. It's about the next to the last document in the file.

Mr. Subkow: I can give you the date, your Honor.

The Court: What page is it of the order? [C]

Mr. Subkow: Item III of the order, your Honor.

Mr. Lyon: It is Item III of the pretrial conference order, and page 12 at the bottom, and the top of page 13 of Plaintiff's Pretrial Statement of Facts. It is very short.

The Court: Just a minute. I don't find any such pages in my copy.

Mr. Subkow: The top of page 4 of the Pretrial Conference Order refers to certain statements in the Pretrial Statement of Facts and incorporates them by reference. The Pretrial Statement of Facts is

dated February 26, 1958. The item referred to is 49(a) appearing on page 12.

The Court: What's erroneous about it? 49(a)?

Mr. Lyon: That's right, your Honor.

The Court: I don't see any 49(a).

Mr. Subkow: The bottom of page 12 of the pre-trial statement, Plaintiff's Pretrial Statement of Facts filed February 26, 1958.

The Court: Where is it referred to in the Pre-trial Conference Order?

Mr. Lyon: Page 4, your Honor, line 4.

The Court: Item what?

Mr. Subkow: Item 15—Item 12 of III.

Mr. Lyon: 49 and all its subdivisions. That is a list.

The Court: You are referring now to one of the subdivisions, 49(a), is that it? [D]

Mr. Lyon: Right.

The Court: That comes from Plaintiff's Pretrial Statement of Facts filed February 26, 1958, page——

Mr. Subkow: Page 12, Item 49(a) at the bottom of the page.

The Court: "By 1949, the problem of the illegality of the back-in units became so acute that they were forced by competition from Waldrip to attempt to design a legal unit."

Mr. Lyon: That, we understand from our man, is simply not true. Waldrip only made seven units all told in its entire existence. So they weren't forced by Waldrip to do anything.

The Court: Is there any objection to relieving the defendant of that admission?

Mr. Subkow: Yes, sir, we certainly object. We don't think that it is, in truth. The defendants state that only six or seven were made of the Waldrip, but he forgets that only 16 were made by the defendant. So the disparity isn't so tremendous. And the fact that they may have been forced by that competition may still be a fact. And we have relied on these admissions in preparing our case. The pre-trial order was filed on the 26th.

The Court: Very well. I will deny the motion at this time, subject to your right to renew it later in the trial [E] if you are so advised.

I don't feel familiar enough with this case at the present moment to rule intelligently on your request.

Mr. Lyon: Your Honor, I don't want to find myself in the position, or have my associate counsel in a position of going contrary to the court's order, but the witnesses are here and would testify, if so permitted, that that is not a fact. Are we precluded from putting that evidence on?

Mr. Subkow: Your Honor, we will object as to being impeachment.

The Court: I don't know why that would be material or relevant to the issue of validity.

Mr. Lyon: Well, we will cross that bridge when we come to it.

The Court: I don't see how it would affect that, the matter of what the intentions of the alleged in-

fringer are, good or bad, as I view it. If the patent is invalid it escapes, doesn't it?

Mr. Lyon: That is correct. Of course, Mr. Subkow tried to use that admission as some sort of recognition of this patent, the validity of this patent, which we don't think is proper.

The Court: I doubt that that would serve any consequence.

You may proceed, Mr. Subkow.

Mr. Subkow: Your Honor has had this matter before you [F] on motion for summary judgment and pretrial and perhaps is sufficiently familiar with the general situation to not require any extensive preliminary statement by myself. Unless your Honor desires opening statements.

The Court: I remember it very well. I just wish my memory right now was as good as it was a few months ago, Mr. Subkow. But it will all come back to me. I haven't had a chance to read the file yet. I thought Judge Reeves would try this case so I didn't——

Mr. Subkow: I understand, your Honor.

As a preliminary matter, we have here a certified copy of the patent which we will offer as Exhibit No. 1.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 1, was received in evidence.)

[See Book of Exhibits.]

Mr. Subkow: We have here for the court's convenience a tabular analysis of the claim, quite similar to the one that was presented on the motion for

summary judgment. It might be helpful, and we offer it either as an exhibit or for identification, whichever the court desires, 1-A.

Mr. Lyon: Do we have a copy of that?

Mr. Subkow: Yes.

The Court: If there is no objection, I will receive it in evidence. It's merely another way of presenting part of Exhibit 1. [G]

Mr. Subkow: Yes. I thought it might save the court some time.

Mr. Kenway: No objection.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 1-A, was received in evidence.)

[See Book of Exhibits.]

Mr. Subkow: At this time, preliminary to introduction of further evidence, I want to put into the record some admissions of the defendants to preclude introduction of evidence. And I am reading from the facts admitted in the Pretrial Conference Order, Item III, paragraph numbered 1, reading as follows:

"United States Letters Patent 2,671,537 was issued to James Moon on March 9, 1954, as assignor to Western Oil Tool & Engineering Co., Inc., a California corporation, as assignee.

"2. Said James Moon is a plaintiff in this action and is also named Cleon James Moon, and the allegations of Paragraph I of the Complaint are true
* * *"

Your Honor, I might interrupt to say that Mr. Moon was baptised as Cleon James Moon and has

been using the name James; although I feel that the name "Cleon" has a very literary and important meaning. I would not myself avoid it, if it had been given to myself. But he is shown as [H] "James Moon" throughout the record and has always used it that way.

"3. Plaintiffs are jointly the owners of said patent and that, except as stated in the following, the allegations of Paragraph II of the Complaint are true, except that defendants do not admit, but instead deny, that said patent was either duly or legally issued.

"4. Plaintiffs by assignment in writing from Western Oil Tool & Engineering Co., Inc. have all of said corporation's right to collect damages for past infringement of said patent * * *"

And I offer here, for the purposes of the record, certified copies of the assignment, as I thought I had there. But I don't have the original.

May I ask defendants whether I gave them the certified copy of the assignment in their file?

Mr. Lyon: I think you gave it to the clerk.

Mr. Subkow: Yes. I am sorry. Of course. We handed our exhibits to the clerk. I am using my own. Please excuse me.

The exhibits are as follows: Exhibit No. 3 is the Assignment from Western Oil Tool & Engineering Co., Inc. to James Moon and Edmond Wagner.

Exhibit 4 is an assignment from James Moon and Edmond [I] Wagner to Philip Subkow.

Exhibit 5 is a confirmation of assignment of rights and of recovery under patent 2,671,537.

Exhibit No. 6 is the confirmation of assignment of right and recovery under patent 2,671,537 to Philip Subkow.

And Exhibit No. 7 is the assignment of additional right by James Moon and Edmond Wagner to Philip Subkow.

I offer these as Exhibits 3 to 7, seriatim.

The Court: Any objection?

Mr. Kenway: No objection.

The Court: Does the pretrial conference order cover the concession as to the due execution of all of these documents?

Mr. Subkow: No. These are certified copies. They were pleaded in the record. They were not denied. And admission of ownership was, in my view, sufficient.

Do I understand that the defendants will admit the due execution and genuineness of these assignments?

Mr. Kenway: We do.

The Court: Very well. Exhibits 3 to 7 are received in evidence.

(The exhibits referred to marked Plaintiff's Exhibits 3 to 7, were received in evidence.)

The Court: The clerk tells me that you have omitted Exhibit 2.

Mr. Subkow: That is the assignment from James Moon to [J] Western Oil Tool & Engineering Co. I thought I had mentioned that. That is included in the group and is included in the stipulation, I believe. I understand defendants so admit.

(The exhibit referred to, marked Plaintiff's Exhibit 2, was received in evidence.)

Mr. Subkow: I will now read some further admissions of preliminary nature.

Item 5 of the same section of the Pretrial Conference Order reads as follows:

"5. Plaintiffs did prior to December 27, 1957, notify defendant Howard Supply Company of their said alleged infringement of said patent, to wit, on or about November 8, 1956, and did notify defendant Cabot Shops, Inc., on August 17, 1955, and again on April 24, 1956, by letter in writing."

And continuing with paragraph 6 of the same section of the Pretrial Conference Order, it reads as follows:

"6. Franks Manufacturing Corporation was prior to the fifth day of April 1955 an Oklahoma corporation and had its principal offices at Tulsa, Oklahoma, and a legal and established place of business in the Southern District of California from and after March 9, 1954 until said fifth day of April, 1955."

And continuing, reading from the same section of the [K] same pretrial order, Item 7 reads as follows:

"7. On or about said 5th day of April 1955 said Franks Manufacturing Corporation did merge with the Cabot Shops, Inc., a Massachusetts Corporation, and that the merged corporations, the defendant in the herein action, has continued the business of said Franks Manufacturing Corporation, through the Franks Division of said Cabot Shops, Inc., and has

maintained since said 5th day of April, 1955 and does now maintain a regular and established place of business in Tulsa, Oklahoma and in Los Angeles County, State of California, within said Southern District of California.

“* * * 9. Defendant has acquired all the liabilities of said Franks Manufacturing Corporation, an Oklahoma corporation * * *”

May I ask the defendants whether they will stipulate that the word “defendant” refers to Defendant Cabot Shops, Inc.?

Mr. Kenway: So stipulated.

Mr. Subkow: “10. Defendant does not claim any ownership or any part of the right, title and interest in or to said Letters Patent 2,671,537, or in or to the inventions and discovery secured thereby, nor any shop right, or any other right or license thereunder or thereto * * *” [L]

May I ask the defendants whether they will stipulate that the word “defendant” in that statement refers to the defendant Cabot Shops, Inc.?

Mr. Kenway: Agreed.

Mr. Subkow: The answer to Interrogatory No. XX served on March 20, 1958, is as follows: And I will read that into the record.

“Interrogatory No. XX.

“State in what respect defendant claims that the Patent No. 2,671,537 was not either duly or legally issued, as alleged in Paragraph 2 of Defendants’ Answer.

“Answer:

“Further answering Interrogatory No. XX, de-

endants' contentions are set forth in the pretrial conference order."

I will now read from the pretrial conference order, paragraph VIII, as follows:

"The following issues of law, and no others, remain to be litigated upon the trial:

"1. (a) Was the invention, claimed in the claims of the patent in suit, patented or described in any printed publication, cited by defendant Cabot Shops, Inc. in its answer to Plaintiff's Interrogatories, before the invention thereof by James Moon?" [M]

The answer to that interrogatory—no. I am sorry. That is the statement.

"(b) Was the invention patented or described in a printed publication in this country, cited by said Defendant in its answer to Plaintiff's Interrogatories, more than one year prior to the filing of the application for the patent in suit?

"2. If the invention of the patent in suit is not identically disclosed in any of the aforesaid patents and patent publications, as referred to in paragraph 1, subparagraphs (a) and (b) above, is the difference between the subject matter sought to be patented by said patent and the said patents and publications such that the subject matter as a whole would have been obvious at the time the invention was made to persons having ordinary skill in the art to which said subject matter pertains? * * *

Items 3 and 4 relate to infringement. They are short, so I may read them.

"3. Does the equipment as illustrated in the 1956

Catalog of Defendant Cabot Shops, Inc., at page 1810 and in the 1957 Catalog at pages 1883, 1884 and 1885, and manufactured and sold by said defendant and its predecessor, Franks Manufacturing Corporation, constitute an infringement of the claims of the patent [N] in suit?

“4. Has the defendant Howard Supply Company infringed the patent in suit by sale of any of the foregoing equipment?”

I may pause at this point, your Honor, to say that I have been approached by defendants with the suggestion that there has been some error in the admission in the pretrial order that the Howard Supply Company had actually joined in the sale which is accused here; and we do not want to be placed in the position of putting the Howard Supply Company to the trouble of litigating this lawsuit if in fact they are an innocent party. And the problem is one, however, of procedure as to how to get the Howard Supply Company out of this litigation without prejudicing any of our rights. And perhaps defendants would at this time——

The Court: Can't you stipulate to a dismissal of them, without prejudice?

Mr. Subkow: The point is, your Honor, it's an extraordinary thing. We can do that, but my research indicates that you can't dismiss as to one of the parties, but you have to dismiss the whole action.

The Court: You mean because they are joint tortfeasors?

Mr. Subkow: Joint, yes, sir. And furthermore, if they are—— [O]

The Court: Couldn't you bring a covenant not to sue them under this recent California Supreme Court decision?

Mr. Subkow: Or proceed by a dismissal under the misjoinder provision of the thing.

I just don't want to be placed in the position of dismissing a joint tort feisor and find that I am out of court. So I would like a little more time to think this thing through. And I suggest that the point won't really arise until the infringement part of the thing arises. It may be delayed until that time.

The Court: Very well. But counsel for Cabot Shops appears for all of the defendants, I take it.

Mr. Kenway: Yes, your Honor. I might say, also, that Cabot Shops has indemnified Howard Supply Company, and Howard Supply Company is selling our product, and would continue to do so.

I think technically they haven't participated in the sale of the accused structure. But I have no objection to their remaining in the case.

Mr. Subkow: If that were the case, then the record is imperfect. I must say that defendants have co-operated excellently with us, and I believe there has been good relationships on that score, and I want to extend my thanks to that. I have tried to do the same.

The Court: Well, I am sure that both sides have co-operated. [P]

Mr. Subkow: But the difficulty is, your Honor, that the procedure that we were going to follow was

that the Howard Supply Company failed to answer some interrogatories and they were ordered by your Honor to answer them, and they have answered only a portion of the interrogatories. We had agreed that they could adopt the answers of the Howard Supply Company by stipulation; but in view of the possibility that they would be dropped from the case, we haven't proceeded with that stipulation, and the record, as it stands now, we have no answer by the Howard Supply Company.

So, can we hold that in abeyance until the time comes?

The Court: You may.

Mr. Subkow: And if it is decided that the Howard Supply Company shall remain here, may it be stipulated that that stipulation will apply nunc pro tunc to any other admissions that have been made and introduced in evidence beforehand as against the Cabot Shops?

Mr. Lyon: Well, there is a written stipulation which I prepared and showed to you, and didn't sign, and you didn't sign it. It's sitting on my desk right now if you want it. I might send my secretary down and get it.

Mr. Subkow: Oh, no. I am making no point of it except that I would like to see a tidy record.

The Court: Will it be here? [Q]

Mr. Lyon: It will be here this afternoon.

The Court: Very well.

Now, do you have an extra copy of the patent in suit that I can mark up?

Mr. Subkow: Yes, we have one for you.

(Whereupon the document was handed to the court.) [R]

Mr. Subkow: You know, there must be some devil in exhibits. No matter how long you handle them, you always find something is misplaced, or something is wrong.

The Court: When you have so many of them, that often happens. I have it now, and I was going to use it in connection with the other exhibit,—

Mr. Subkow: We provided one, I know.

The Court: —Exhibit 1-A.

Mr. Subkow: Yes. May I continue with the reading of the preliminary matters?

The Court: You may.

Mr. Subkow: I wish now to read an answer by the defendants, Cabot Shops, Inc., which was served on me on February 21, 1958, to plaintiff's interrogatories, Interrogatory No. XXI. I am waiting until you find it. I have excerpted it and put it in my book that way. It is Interrogatory XI of the Interrogatories which were served on me on February 21, 1958, and let me say, it is the first set of answers.

I will read now:

“XXI. State the date upon which it is alleged by defendants in Paragraph 5 of their Answer that the invention, identified by defendant as the ‘alleged invention’ in said Paragraph 5, was made and state if defendant will rely on evidences other [S] than those referred to in Paragraphs 6 and 7 of the Answer to show the state of the art and, if so, state of what such evidences consist.

“Answer: Defendant is presently without independent knowledge as to the date of the making of the alleged invention by the plaintiff Moon. Defendant will not rely upon evidence as to the prior art other than patents and publications previously called to the attention of plaintiffs except for Waldrup advertisements appearing in journals and publications in 1946 and 1947.”

May I ask the defendants’ counsel whether they will stipulate that “in 1946” is stated in error in that answer?

Mr. Kenway: Yes, that answer should be confined to the year 1947.

Mr. Subkow: I will now read the answer to the same interrogatories as to Interrogatories XXII and XXIII, which were served on me on March 20, 1958, in conformance with the order of your Honor, as follows:—

Interrogatory No. XXII reads as follows, and I have previously read Interrogatory XXI to your Honor:

“State what part or parts of the invention or improvement referred to in Paragraph 5 of the Answer does not embody substantial variations of changes from that which belong to the state of the art as [T] it existed at the time of the alleged inventions thereof, as alleged in Paragraph 5 of Defendants’ Answer.”

Interrogatory No. XXIII reads:

“Give the name, date, title and pages of the publications referred to in Paragraph 6 of the Defendants’ Answer.”

The answer to Interrogatories XXI, XXII and XXIII is as follows:

“Further answering Interrogatories XXI, XXII and XXIII, the evidence to be relied upon by defendant, Cabot Shops, Inc., as to prior art will consist of the patents and publications, copies of which appear in connection with Exhibits M, N, O, P, Q, R, S and T. Defendants accept December 16, 1946 as the date upon which Mr. James Moon made the alleged invention of the patent in suit.”

May I ask defendants whether they will stipulate that this last sentence is an admission by them, and that they will waive all further proof of the date, that the date of the invention is December 12, 1946. I understand that “16” was an inadvertence.

Mr. Kenway: Of course, we deny that any invention ever was made, but if you want to pick December 12th as the date of that, I am happy with that.

Mr. Subkow: Then I understand that if there is an invention here, they will agree and will waive all further proof of the fact that it was made on December 12, 1946; is that correct?

Mr. Kenway: Yes, sir.

The Court: December 12, 1946.

Mr. Subkow: Now, your Honor, the answer to the interrogatory is uncertain, in that it refers to certain exhibits. These exhibits have not yet been introduced in evidence, and I have been assured by—well, I will ask defendants’ counsel if they will now identify for the record the items which they refer to as Exhibits M, N, O, P, Q, R, S and T, and I may say that in asking that I am not sponsoring

and not introducing them into evidence, but merely to identify them so that the answer may be definite and certain.

May they be so received with such a limitation, your Honor?

The Court: Any objection?

Mr. Kenway: No. The clerk has the exhibits, your Honor.

Mr. Subkow: You see, I am not offering them as a piece of evidence in the record, but merely in explanation of the interrogatory. I am not sponsoring these pieces of evidence.

The Court: Are they identified in the interrogatory?

Mr. Subkow: Only by number and letters, without stating [V] what they are.

If your Honor will turn to the interrogatories served on March 20th, that is the last paper, and I don't know that it has even been entered into the file. May I inquire of the clerk whether he has that document?

The Court: The interrogatories filed March 20th?

Mr. Subkow: Yes, sir.

The Court: I don't seem to have a copy.

Mr. Subkow: I know. They were loose when I saw them last.

Mr. Lyon: I think the best way to solve your problem is to mark as exhibits for identification the things that we will rely upon as constituting the material you are making inquiry about. Will that be acceptable?

Mr. Subkow: Yes.

The Court: Aren't they referred to in the interrogatories themselves?

Mr. Subkow: No, sir, they are not. In the interrogatories they are referred to in just exactly the way I read it by reference to exhibit numbers for identification which the defendant proposes to apply to them when he offers them in evidence.

The Court: Have any exhibits been marked on behalf of the defendants?

Mr. Lyon: All of them. [W]

The Court: Have these that you refer to now been marked?

Mr. Lyon: They have been marked, but the clerk has not put his initials on them.

The Court: Can't we refer to them by stipulation, and stipulate that the documents referred to in the interrogatories are exhibits so and so and so and so?

Mr. Subkow: Yes, sir, provided there is no implication that we are offering them on behalf of the plaintiff.

The Court: You are offering the interrogatory. This is a part of the answer, is it?

Mr. Subkow: No, this is a part of the answer to the interrogatory.

The Court: Yes. You are offering the answer, is that it?

Mr. Subkow: Yes, but not the exhibits.

The Court: You are offering the exhibits to make the answer intelligible?

Mr. Subkow: That is right, but we are not spon-

soring them in evidence, and we will object to their introduction as exhibits.

The Court: Can you state a stipulation on the record of what documents you are now referring to?

Mr. Subkow: I must have the documents before I can do so. [X]

The Court: Certainly. The clerk will hand them to you. I assume those are the documents?

Mr. Subkow: I assume so, too. There is no question because——

The Court: Offer a stipulation that exhibits so and so and so and so, for identification, are the exhibits referred to in the answer to interrogatories so and so.

Mr. Subkow: I accept your Honor's suggestion.

The Court: I can't fill in the information. You will have to fill it in. We are taking a lot of time, it seems to me, on something that should be straightened out without much difficulty.

Mr. Subkow: It would have been simple had they listed them in the——

The Court: I am not implying blame to anyone. Will you state the stipulation?

Mr. Subkow: Yes, your Honor. I am prepared to do so immediately.

The Court: Proceed.

Mr. Subkow: All right. May it be stipulated that Exhibit M referred to in the answer to Interrogatory XXIII is the print from the "Oil Weekly" of May 5, 1947?

Mr. Lyon: So stipulated.

Mr. Subkow: That the Exhibit N referred to in

the Interrogatory XXIII is the print from the "Oil & Gas Journal" [Y] of May 10, 1947.

Mr. Lyon: So stipulated.

Mr. Subkow: That Exhibit O is the "Petroleum Engineer" of June 1947.

Mr. Lyon: Page 192. So stipulated.

Mr. Subkow: I don't understand. Exhibit O here is a volume.

Mr. Lyon: 192 is the pertinent page.

The Court: Page 192 of Exhibit O is the document referred to, as I understand it; is that right?

Mr. Lyon: Right.

Mr. Subkow: Exhibit P is May, 1947. Is only page 234 referred to?

Mr. Lyon: Page 234 is the pertinent page.

Mr. Subkow: I don't understand, your Honor. What is the exhibit? Is it the book itself?

The Court: The exhibit will be the document, I suppose.

Mr. Subkow: But is it the page, or is it the book?

The Court: It is only for identification, but what is referred to in the interrogatory, I take it, is the page. Is that correct?

Mr. Subkow: That is what I would like to know.

Mr. Lyon: Well, the cover page shows the date. We will offer the whole book, and call the court's attention to page 234. [Z]

The Court: The book itself will be the exhibit, and the page referred to is the page specified. Anything further on that?

Mr. Subkow: Q is the "Petroleum Engineer" of April, 1947.

Mr. Lyon: All we are interested in in that one is the cover.

Mr. Subkow: Then it is the cover which is the exhibit. Now, then there are R, S and T.

The Court: These have not been marked in evidence as yet.

Mr. Subkow: That is the point.

The Court: You are only speaking of them for purposes of identification——

Mr. Subkow: That is right.

The Court: ——to render intelligible the answers to the interrogatories, as I understand it.

Mr. Subkow: Yes. R is a print from "Oil" of 4-24-47, and S is a book of exhibits.

May I ask the defendants whether S represents a book of patents, each of which are referred to at the back of the printed copy of the patent in suit?

Mr. Kenway: No, sir.

Mr. Subkow: What are they?

Mr. Kenway: S is prior art patents, and it happens that [AA] none of them appear on the patent. You are referring to Exhibit T, Mr. Subkow, and that is the patents which are referred to at the end.

Mr. Subkow: There is a confusion in the record. If you will look at it, you will see that the record is such.

Mr. Kenway: I think the tags were reversed when they were put on the book, and what is S should be T-1, and vice versa.

(Thereupon the tags were changed by the clerk, so as to correctly reflect the record.)

Mr. Subkow: Your Honor, we have a list of their patents submitted to us. We have never seen the book before. May I have just a minute to glance through the book, and check it against my list?

The Court: Yes.

Mr. Subkow: May I do that later on, and ask for a stipulation to that effect?

The Court: Yes, you may pass it now, subject to check later, if you so desire.

Mr. Subkow: Yes, that will be fine.

May I ask, then, is Exhibit S a book containing only each of the patents listed on the back of the printed copy, Exhibit 1?

Mr. Kenway: No, that is Exhibit T-1.

Mr. Subkow: Oh, you have now changed it, but you haven't changed it up here. [BB]

Mr. Kenway: Exhibit S is a book containing the patents that are listed in the answers to the interrogatories at the end under the title, Exhibit 16.

Mr. Subkow: We have it. There is an answer to Interrogatory XXIV—let's take up S first. S is the list of patents which is contained in the answer to the interrogatory XXIV, served February 21, 1958; is that correct?

Mr. Kenway: Yes.

Mr. Subkow: And T is a book containing patents which are listed on the back of the printed patent, Exhibit 1; is that correct?

Mr. Lyon: That is T-1.

Mr. Subkow: Let's erase that, then.

Now, this is the last of my reading to the court before putting on witnesses. Interrogatory XXIV:

“Give the numbers, dates and country issuing each of the patents referred to in Paragraph 6 of said Answer, which defendants will urge at the trial best disclose the material elements and combinations of elements as alleged in said Paragraph 6.

“Answer: Further answering Interrogatory XXIV”—This is in the answer served March 20, 1958, and the answer reads as follows:

“Further answering Interrogatory XXIV, defendants are currently of the opinion that the patents to Martin [CC] and Evans, copies of which appear in Exhibit S, are the best patent references.”

I believe that “Martin” is a misprint, and it must have meant Morton in Exhibit S.

Mr. Kenway: So stipulated. The patent intended is Morton 966,345 of August 2, 1910.

Mr. Subkow: The answer to the Interrogatory XXIV, served February 21, 1958, is as follows:

“Give the numbers, dates and country issuing each of the patents referred to in Paragraph 6 of said Answer, which defendants will urge at the trial best disclose the material elements and combinations of elements as alleged in said Paragraph 6.”

This was an answer to an interrogatory previous to the previous answer, to which an objection was made, and may we stipulate that the list given in that answer lists the patents in Defendants’ Exhibit S, for identification?

Mr. Kenway: Agreed.

Mr. Subkow: One more admission. This is an admission from the pretrial conference order, Item III, 11.

The Court: When you speak of III, you are speaking of paragraph——

Mr. Subkow: Roman III, your Honor.

The Court: ——Roman III, Arabic 11 thereof, is that it? [DD]

Mr. Subkow: Yes. May I just check that? My notes just missed that point.

The Court: Is that the one that starts, “Mr. Wayland B. Woody”?

Mr. Subkow: That is the one, sir:

“Mr. Wayland B. Woody gave and duly executed his deposition in Tulsa, Oklahoma, in June 1957 when called by plaintiffs and also at the same place and time gave a separate deposition for defendants upon stipulation; both said depositions are bound in one volume and on file in this court; and said Wayland B. Woody, prior to aforesaid merger, was an officer of said Franks Manufacturing Corporation and since said merger has been at all times and now is a managing agent of defendant.”

The Court: Does that complete the references at this time to the pretrial conference order?

Mr. Subkow: At this moment, except to make one correction with regard to Interrogatory XXI.

The reference in the Interrogatory is to Exhibit T. We have been referring to Exhibit T-1. T is the certified copy of the file wrapper. May it

be stipulated that the reference to T-1 also includes reference to T?

Mr. Kenway: We do.

The Court: So stipulated, gentlemen? [EE]

Mr. Kenway: So stipulated.

The Court: I notice on page 1 of the pretrial conference order, line 23,—

Mr. Subkow: If your Honor please, I will find it.

The Court: There is the word "Complaint" which appears, and it should be "Answer." "a Complaint served March 29, 1957, which Answer"—

Mr. Subkow: May I have that point again, sir?

The Court: Between lines 23 and 24—

Mr. Subkow: Yes, sir.

The Court: —on page 1, line 22, it refers to a Complaint filed on a certain date, as amended by stipulation and answer, "and a Complaint"—that means "Answer," doesn't it?

Mr. Subkow: Oh, yes, sir. May it be so stipulated?

Mr. Kenway: So stipulated.

The Court: Mr. Clerk, will you find the original pretrial conference order filed March 3rd, and I will make the correction.

Mr. Subkow: Thank you, your Honor.

The Court: Do you wish to offer in evidence the order?

Mr. Subkow: I will offer it.

The Court: Proceed, Mr. Subkow.

Mr. Subkow: Your Honor, it was my intention to offer certain portions of the order and stipulations in the course [FF] of the examination where

that fitted best and where the relationship to the evidence could be most clearly observed.

The Court: Perhaps when you finish, you might want to offer the entire document?

Mr. Subkow: I thought that would be a smoother presentation.

The Court: It would probably make a better reading record.

Mr. Subkow: Yes, sir.

The Court: Very well. You may proceed in your own way. [GG]

Mr. Subkow: Now, in view of certain admissions in the record much evidence will not be necessary, and I will read those portions of the admissions which now follow, and will put on the witness when the time comes for proof. In the course of that examination I will wish to read admissions to preclude further examination to save time. And I will ask permission to do so. I understand I have that permission.

The Court: Yes.

Mr. Subkow: I will now read from Plaintiff's Pretrial Statement of Facts which are admitted true and the Pretrial Conference Order, Item III, paragraph 12, and I am reading—this appears on page 2, at the top of page 2.

The Court: Of Plaintiff's Pretrial Statement of Facts?

Mr. Subkow: No, sir, of the Pretrial Conference Order, sir.

Mr. Lyon: You read that.

The Court: When you call it Item III, para-

graph 12, you mean paragraph Roman three, sub-item 12.

Mr. Subkow: Forgive me, your Honor. My record is more perfect than my memory. I read it correctly.

The Court: Very well.

Mr. Subkow: May I start all over again?

The Court: You may.

Mr. Subkow: I am reading from Plaintiff's Pretrial Statement of Facts which are admitted true in the Pretrial [HH] Conference under Item III 12. I am reading the item subparagraph 2, which appears as admitted at the top of page 4 of the Pretrial Conference Order. I am reading the statement from the Plaintiff's Pretrial Statement of Facts.

The Court: Paragraph 2.

Mr. Subkow: Paragraph 2.

Your Honor, I would be less long-winded—I am afraid I am too long-winded now—if instead of keeping repeating if I could say “admitted statements,” or some tag that would be understood to mean the same thing.

The Court: You mean referring to the——

Mr. Subkow: To the admissions which are made in the Pretrial Conference Order.

The Court: Yes. I should think that would be sufficient, to refer to the—state it as admitted in the Pretrial Conference Order and read it.

Mr. Subkow: Something is said of identifying it.

The Court: If the defendants want to challenge it, why, let them specify.

Mr. Subkow: That would simplify it.

I am reading paragraph 2, subparagraph (a):

“Prior to 1948, portable derricks employed for servicing and drilling oil wells of the telescopic lattice or trussed four-legged type, were of the back-in type. [II]

“(b) These are so called because a derrick was transported and mounted on the vehicle so that it was hinged at the back end of the vehicle. The driver and the engine were positioned at the front end of the vehicle. The vehicle had to be backed into the location in order to erect the derrick.”

Admitted Item No. 13, from the Statement of Facts reads as follows:

“(a) The portable telescopic truss-type derricks of the back-in kind were substituted for permanent derricks previously employed in many instances
* * *

I have some exhibits, Exhibits 8, 9, 10, 11, 12 and 13. I will refer to these exhibits in connection with the witness, but I thought that at this time your Honor might like to look at pictures of this back-in type in this connection; and I believe that all of these are——

The Court: Didn't I see those in the record on the motion?

Mr. Subkow: No. These are different exhibits and show various features of it.

The Court: Very well.

Mr. Subkow: I thought it might be helpful.

The Court: These are the earlier type.

Mr. Subkow: Yes, sir. These are the back-in type before 1948, I believe. If the defendants will

stipulate that these may go in evidence, your Honor may look at them. [JJ]

The Court: That's 8, 9, 10, 11——

Mr. Subkow: 11, 12 and 13. Does your Honor have a list of our exhibits?

The Court: Yes. It is part of the pretrial order. I have it before me.

Mr. Subkow: They have been modified. As a result of all these admissions I have cut out a lot of exhibits. So, may I give you a new exhibit list?

The Court: Yes, I would be glad to have it. I have the list, of course, which is a part of the Pretrial Conference Order.

(Whereupon the document was given to the Court.)

Mr. Subkow: Let me explain, your Honor, that we have a list of exhibits with former identification in the pretrial order tabulated, and we have also, since we are going to have a deposition, prepared a document tabulating the deposition exhibit number and the corresponding number which we have in our list in order to simplify cross referencing.

The Court: Yes. I have it.

Mr. Subkow: The format, I believe, will be obvious.

The Court: Very well.

Mr. Subkow: The clerk tells me that there are some exhibits missing. What is the one that you can't find?

The Clerk: 10, 11,——

Mr. Subkow: No. 10 is the White patent. I have an [KK] extra one for you.

What is the other one?

The Clerk: No. 11.

Mr. Subkow: That is the Woody patent. You haven't got that?

The Clerk: And No. 12.

Mr. Subkow: What's 12?

You haven't got a picture of this?

The Court: A photograph of the Franks back-in unit.

Mr. Subkow: Yes. You should have them there.

Mr. Lyon: I don't have them either.

Mr. Subkow: They were given to you.

Well, let's not delay. Here are some more. You can have those. I will find some more later.

If the clerk finds them, may I have his, your Honor?

The Court: Yes. Perhaps you can straighten them out at the recess.

Mr. Subkow: Well, you have them because they are Woody exhibits.

Mr. Kenway: I see.

Mr. Subkow: We did not give the defendants copies of Exhibits that they already have.

The Court: Now, these are offered in evidence, trial Exhibit 9, 10——

Mr. Subkow: 8, 9, 10, 11, 12 and 13. [LL]

The Court: Is there any objection to them?

Mr. Kenway: Let me say this, your Honor, that I haven't seen them before; and some of these purport to be photographs of our unit. If I could consult with——

Mr. Subkow: Well, if there is any question, I

will offer them for identification and get them proofed up later.

Mr. Kenway: Well, if you will just give me a minute to ask my witness.

The Court: Very well. We will take the morning recess at this time for five minutes.

(Short recess.)

Mr. Kenway: During the recess I consulted Mr. Woody, who is chief engineer of the defendant division here, and he tells me that Exhibits 8, 9 and 13 are what you identify them to be, and we have no objection.

Mr. Subkow: What about the others?

The Court: 10, 11 and 12. 10 is the White patent. 11 is the Woody patent. And 12 is a photograph of the Franks back-in unit, side view.

Mr. Subkow: There can be no objection to the patents.

Mr. Kenway: Certainly not.

The Court: Then as I understand the offer, offered Exhibits 9, 10, 11, 12, 13, it's stipulated that they are genuine and in all respects what they purport to be and may be received in evidence. [MM]

Mr. Subkow: You omitted No. 8, your Honor.

The Court: Did I? I am sorry. Exhibit Nos. 8, 9, 10, 11, 12 and 13 are received in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 8, 9, 10, 11, 12 and 13, were received in evidence.)

[See Exhibits 10, 11 and 12 in Book of Exhibits.]

Mr. Subkow: Your Honor, in connection with

the next admission I should like permission to withdraw from the exhibits attached to the Woody deposition, Exhibit No. 42——

The Court: Do you have any other copy of it?

Mr. Subkow: We have been relying on the Woody deposition in the court as the court's copy, your Honor.

The Court: You don't have an extra copy?

Mr. Subkow: I would have to give you my own.

The Court: No. I wouldn't want that.

Mr. Subkow: We have one for the witness and one for ourselves. And I had hoped that your Honor could use the——

The Court: Yes. The Woody deposition, Exhibit No.——

Mr. Subkow: 42.

The Court: ——42.

Mr. Subkow: It's Exhibit No. 88 in the list of plaintiff's exhibits.

The Court: Trial Exhibit No. 88.

Mr. Subkow: Yes, your Honor.

The Court: Do you have it, Mr. Clerk?

The Clerk: Yes, I do, your Honor. [NN]

The Court: Is there any objection, gentlemen?

Mr. Kenway: No, your Honor.

The Court: What is the document? What is the nature of it?

Mr. Subkow: It's a—well, now, in my list I think it's a catalog.

The Court: It's a document of some kind, and it's stipulated to be genuine and in all respects what it purports to be, I take it; and Exhibit No. 42 of

the Woody deposition will be received in evidence as trial exhibit 88.

(The exhibit referred to, marked Plaintiff's Exhibit 88, was received in evidence.)

Mr. Subkow: Will you give me that Exhibit No. 88, and I will tell you what it is.

(Whereupon the exhibit was handed to counsel.)

Mr. Subkow: Exhibit No. 88 is a photograph.

The Court: 88 is a photograph?

Mr. Subkow: It's a photograph of a back-in unit. And I do have another photograph, and I had hoped to be able to use that with the witness, you see.

The Court: Very well. You may.

Mr. Clerk, may I see it, Exhibit 88?

(Whereupon the exhibit was handed to the court.)

Mr. Kenway: May I see it, too?

(Whereupon the exhibit was handed to counsel.) [OO]

The Court: Do you have the Woody deposition, Mr. Clerk?

The Clerk: Yes, I do, your Honor.

The Court: Well, that's what we want. It's Exhibit 42 of the deposition.

The Clerk: This is marked Exhibit No. 42. And these are the exhibits that were with the original deposition.

The Court: The clerk informs me—hold that up, Mr. Clerk—that the brochure there is marked Ex-

hibit 42 of the Woody deposition, as he understands it.

Mr. Subkow: That must be marked wrong, because the list of the exhibits at the front of the deposition, 42 is a Franks unit, November 8, 1938.

Let me see what it says in the deposition. I will get that straightened out immediately.

You are correct. The catalog is No. 42.

The Court: Is photograph 44 the one? It shows a derrick standing in place.

Mr. Subkow: Well, I will check that, your Honor.

The Court: Well, I can see that it isn't from the photograph you have here.

Mr. Subkow: Yes. It's a photograph.

The Court: 44 is a photograph.

Mr. Subkow: 43 is a photograph. And it is marked in evidence as 43. It may very well be that we are talking about No. 43. [PP]

At any rate, this is the exhibit. And may I give this photograph to you and correct it later? I mean, we are wasting time.

The Court: How do you wish it marked? We have said Exhibit No. 88.

Mr. Subkow: As Exhibit No. 88, your Honor.

The Court: Very well. The photograph is received in evidence and marked Exhibit No. 88.

(The exhibit referred to, marked Plaintiff's Exhibit 88, was received in evidence.)

The Court: You gentlemen would save a great deal of talk, whenever there is no objection to a photograph——

Mr. Kenway: No objection.

The Court: —I will assume that means that you stipulate that the document or photograph is genuine and in all respects what it purports to be; and if it is a letter that it was written and sent by the person purporting to sign it and to the addressee addressed and sent by regular mail and received in due course on or about the date it bears; and if it is a photograph that it fairly depicts what it purports to depict.

Is that agreed?

Mr. Kenway: Yes, your Honor.

Mr. Lyon: Yes, sir.

The Court: Very well. [QQ]

Mr. Subkow: May I have your authority to withdraw the copy that is in the record for my use in case another copy is found by the clerk?

The Court: Yes.

Mr. Subkow: I will now read the item in connection with which I have submitted the photograph. This is Item 14 from the Pretrial Statement of Facts, which is admitted true in the Pretrial Conference Order.

“14 (a) Defendants’ predecessor, Franks Manufacturing Co., manufactured and sold a telescopic truss-type back-in truck mounted derrick in 1939.

“(b) Previously it had built back-in derricks which were not telescopic and were designed for light service in which they used hydraulic jacks to erect the derrick.”

May I have a stipulation from the defendant that Exhibit 88 illustrates such a unit?

Mr. Kenway: There again you have me at a disadvantage. I have to check with Mr. Woody to make sure that was so. I have no quarrel with it. I just don't know, sir.

The Court: Can you do that now?

Mr. Kenway: I would be happy to, sir.

The Court: Very well.

Mr. Kenway: I understand this unit was built about [RR] 1945 or '46 by Franks.

The Court: You so stipulate?

Mr. Kenway: Yes, sir.

Mr. Subkow: No, sir, your Honor, I do not so stipulate. We will let the matter remain open until the deposition is read. It's my remembrance—well, I won't comment. May we pass that point?

The Court: Yes.

Mr. Subkow: With this comment, that my remembrance is not clear enough to make any statement at the present moment.

Mr. Kenway: May I say this, that we might shorten things up if Mr. Woody were permitted to sit at my elbow here, if that would be satisfactory.

The Court: Yes.

Mr. Subkow: No objection. May we have the same aid?

The Court: Yes, you may.

Mr. Subkow: Your Honor, my next point requires reading from the Woody deposition, but that would chop things up too much, so I suggest that I pass that and let that be filled in when I read the deposition.

I will now read the following agreed statement

of facts from Plaintiff's Pretrial Statement of Facts admitted true, Pretrial Conference Order, Item 16:

"One of the difficulties with the back-in units was that they did not comply with highway [SS] laws of the various states in that they could not be built so as to comply with:

"(a) The limitations of loading on the front or rear wheels; or with

"(b) The overhang requirements, or over-all height requirements.

"17. Additionally, the position of the derrick was such that the top of the derrick had to protrude in front of the vehicle for more than was allowable under the highway laws of many states."

I have now reached the point where I would like to swear a witness, your Honor.

The Court: Very well, you may.

Mr. Subkow: Mr. Moon, will you take the stand?

Tuesday, March 25, 1958; 9:30 a.m.

* * * * *

CLEON JAMES MOON

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Cleon James Moon.

The Clerk: How do you spell your first name?

The Witness: C-l-e-o-n.

Direct Examination

Q. (By Mr. Subkow): You are also known as James, are you not? A. Yes.

(Testimony of Cleon James Moon.)

Q. Are you a registered professional mechanical engineer of the State of California?

A. I am.

Q. What has been your experience in connection with the design of oil field equipment?

A. From 1938 until 1944 I was the design engineer for Franks Manufacturing Corporation.

From 1944 to 1945 I was the design engineer and chief engineer of Hillman-Kelly.

Q. What relation did Hillman-Kelly have with Franks [4] Manufacturing Corporation at that time?

A. Hillman-Kelly were the dealers for Franks' equipment in California.

Q. Continue.

A. From 1945 until the present I have been a consulting engineer in California. Additionally, I founded, in conjunction with Mr. Wagner, Western Oil Tool & Engineering Company, and developed a line of portable drilling and serving equipment for the oil industry.

I am currently the chief engineer of the Bender Oil operations and Bender Engineering & Manufacturing Company.

Q. What does Bender Engineering & Manufacturing Company manufacture?

A. They design and manufacture a line of portable drilling and servicing masts for the oil industry. [5]

Q. Are you a member of any professional associations?

(Testimony of Cleon James Moon.)

A. I belong to the American Petroleum Institute.

Mr. Kenway: Just a moment. If your Honor please, is the witness reading his answers?

The Witness: No, I am not. This happens to be a copy of the patent. I just happen to have it in my hand.

Mr. Kenway: Oh, I am sorry.

The Witness: I am a member of the American Petroleum Institute, and I am on the Mast Standardization Committee for API Standards 4-D.

Mr. Subkow: Is your Honor acquainted with the nature of the American Petroleum Institute?

The Court: I think generally.

Mr. Subkow: Perhaps we might——

The Court: You might let the record show.

Q. (By Mr. Subkow): Will you state what the American Petroleum Institute is?

A. The American Petroleum Institute is an industry sponsored organization created primarily for the standardization of tools used in the oil industry.

The Institute recommends that certain standards be followed, so that confusion will not result in the industry from having parts of one type of equipment, or in this case products mismatch with products of another section of the industry. [6]

A typical example is tool joints, where if the industry were allowed to run without standards, no two tool joints from separate companies would match.

(Testimony of Cleon James Moon.)

Q. Are there any features of safety or utility included in the considerations of the Committee?

A. In the case of the Committee a Code has been established.

Q. What Committee are you talking about now?

A. The Derrick Standards Committee.

Q. Are you a member of that Derrick Standards Committee?

A. Yes, I am a member of that Committee.

Q. How long have you been a member of that Committee? A. Since about '45.

Q. Continue, please.

A. In the case of the Derrick Standards Committee a Code has been created.

Q. You haven't answered my question, Mr. Moon. Have you been a member of the Derrick Committee continuously since 1945?

A. I am sorry. Yes, I have.

Q. What is the function of the Committee?

A. The function of the Committee is to create a Code for the proper rating and safe rating of portable masts.

Q. Do they include the portable masts which are mounted upon vehicles to be transported to the site upon the vehicles, [7] and erected adjacent the vehicles, such as the back-in type?

A. Yes, they do.

Mr. Subkow: I wondered if there was any voir dire.

Mr. Kenway: No.

Mr. Subkow: Is the clerk motioning to me?

(Testimony of Cleon James Moon.)

The Clerk: No.

Q. (By Mr. Subkow): Mr. Moon, you have listened to the reading of the various statements into the record. May I ask you this—

Mr. Subkow: Your Honor, we have prepared a set of exhibits to be used by the witness. May we hand the set to him? It would save time in viewing the exhibits.

The Court: Yes, you may. The clerk will hand them to him.

(The documents referred to were handed to the witness.)

Q. (By Mr. Subkow): Mr. Moon, will you pick up Exhibits 8, 9, 10, 11, 12 and 13, please. One statement read into the record said, "Additionally"—and I am repeating it with your Honor's indulgence—"Additionally the position of the derrick was such that the top of the derrick had to protrude in front of the vehicle for more than was allowable under the highway laws of many states."

Will you turn to Exhibits 8 and 12, and did the derrick in any way interfere with the vision of the driver while he was driving that derrick over the road? [8]

A. There was an interference with upward vision as he was driving over the road, and this was important when he was passing under telephone lines and field power lines.

Q. Are you familiar with the unit that is shown in that photograph? A. Yes, I am.

Q. What is your familiarity?

(Testimony of Cleon James Moon.)

A. I took this photograph at Santa Maria, California, in the year—well, it was probably 1943. This is a Franks' double-drum telescoping vehicle mounted mast, truck-mounted mast, with a mast of about 96, or, 90 feet in height mounted on the truck. It was an FWD all wheel drive truck.

Q. What was your connection with that unit?

A. I laid out this unit as far as the outline design and mounting was concerned.

Q. For whom?

A. In California for Franks Manufacturing Corporation.

Q. Did you have anything to do with the sale of that unit?

A. Yes, I worked on the sale of this unit in conjunction with representatives of Hillman-Kelly. I erected it the first time in the field.

Q. In what respect did the limitation of the vision of the driver have any material importance?

A. The importance in the limitation of the vision of the driver concerned overhead power lines and telephone lines. It is common practice for field operators to provide their own power lines, and quite frequently these are not as high as a power company would provide them. Consequently some care has to be taken when the unit is driven around the lease roads.

Now, this unit is over 14 feet in height. In fact, with the crow's-nest around the top of the mast, as can be seen in the photograph, the height of that unit would be over 15 feet. [10]

(Testimony of Cleon James Moon.)

Q. (By Mr. Subkow): Would that introduce any problems with regard to clearance of bridges and overpasses?

A. Yes, it would. One unit like this actually jammed into the bridge over the Santa Ynez river at Buellton, California, because of its height.

Q. Couldn't the driver see that the unit would not pass underneath the bridge?

Mr. Kenway: I object. He wasn't there. That calls for speculation.

Mr. Subkow: I withdraw the question. It's technically imperfect, of course.

Q. (By Mr. Subkow): Were you present when that happened? A. I was present.

Q. Will you describe what occurred?

A. I was trailing the vehicle in a company car and was perhaps a block behind it. The driver was under the impression that he had sufficient clearance to clear the top stringers of the bridge. He did not get out and check it and, consequently, he did jam into the stringers of the bridge; although at a very, very slow speed.

Q. Do you ascribe his failure to the limitation in vision which occurred because of the overhang?

A. It was responsible for it in this case.

Mr. Subkow: May I ask the clerk to hand Exhibit No. 13 [11] to the court?

(Whereupon the exhibit was handed to the court.)

Q. (By Mr. Subkow): Will you state the purposes for which units of that kind are employed?

(Testimony of Cleon James Moon.)

Mr. Subkow: And by "that kind," I refer to the one shown in my missing exhibit. What is the number of that?

The Court: 13?

Mr. Subkow: The photograph of the unit.

The Court: Exhibit No. 13. That's the back-in unit.

Mr. Subkow: The back-in unit, the one that I lost. The one that got jammed in the overpass.

The Witness: This one?

Mr. Subkow: Yes. What exhibit number is that?

The Witness: This is Exhibit No. 12.

Mr. Subkow: Will you state the purposes for which units like Exhibit 12 are employed?

The Witness: Units like Exhibit 12 are used for the servicing of oil wells.

Your Honor, if I may explain, after an oil well has been drilled it is cased with a large diameter pipe called casing. It may be many thousands of feet long. Inside of that casing we run tubing to the production horizon. If the well does not flow, we also run a pump on the bottom of that tubing, and we run rods inside of the tubing to actuate the pump from the surface. So, there are, in effect, actually [12] three strings of pipe, or three strings of steel in the hole all the way from the surface.

Frequently, and particularly wells on the pump require bottom hole servicing. Sand may enter through the bottom of the well, or the pump may

(Testimony of Cleon James Moon.)

wear out, or the hole may be a little crooked and the rods will wear through the tubing and cause the tubing to leak. There are many things that can happen.

The Court: Is that what you call, sometimes, cleaning out the well?

The Witness: Yes, that's right. That's what you call cleaning out the well.

Prior to 1938 most oil fields were equipped with conventional and permanent derricks. This represented a considerable capital investment. Franks Manufacturing Corporation came out with this line of truck-mounted equipment to replace permanent derricks. And they were quite popular. In many areas permanent derricks have disappeared.

There is one oil field in Southern California where there are over 350 wells and not a single permanent derrick.

The Court: You take away the derricks even when the well is flowing?

The Witness: Yes.

The Court: In other words, this apparatus you are speaking about is designed to service wells that flow as well as [13] wells that pump.

The Witness: That's right. And it is of particular importance on wells that pump, because wells that pump require servicing more frequently than wells that flow.

So, the purpose of this equipment then was to replace the permanent derrick, and it did this by backing into location and erecting and extending

(Testimony of Cleon James Moon.)

the mast over the well site. It was then tied down, and the operation of pulling all the tubing out of the hole or rods, or both, as the case might be, was started. And the tubing rods were racked in the portable derrick or portable mast—and, incidentally, those two terms are interchangeable—they were racked in the portable derrick until they were all out of the holes.

The Court: Now, the power—what are they? What you call winches?

The Witness: Yes.

The Court: The power to pull the tube, pull the casing, is that mounted on the truck that carries the derrick?

The Witness: Yes, sir. It's mounted on the truck. And in this case there were two drums, one forward and one rear one. The rear drum carries a sand line which operates a swab or bailer.

Mr. Subkow: May I ask the witness to mark the parts of the exhibits to which he refers so the referencing [14] may be made. "This" or "that" gets meaningless on the printed page.

The Court: Very well.

Mr. Subkow: Will you also mark his Honor's exhibit at the same time?

The witness will do it for you, if you wish.

The Witness: You will have to give me a pen that will mark on this glossy photograph.

I believe we are concerned with Exhibit 12 in this case.

(Testimony of Cleon James Moon.)

Mr. Subkow: Yes. Will your Honor let us have Exhibit 12?

The Court: Yes.

(Whereupon the exhibit was given to counsel and then to the witness.)

Mr. Subkow: Mark the matter which you are going to testify to with numbers, and then you can testify.

The Witness: I will mark the main drum which handles the tubing block as 1; and the sand reel, which handles the swab or bailer, as 2.

Mr. Subkow: May I interrupt? Please mark the exhibit first and then hand the exhibit to his Honor so that when you identify them his Honor will have it before him and can follow your testimony.

(Whereupon the exhibit was handed to the court.) [15]

Mr. Subkow: Now, will you repeat your statement?

The Witness: I will mark the main drum, which handles the tubing block, as 1; and the sand reel, which handles the bailer or swab, as 2.

Mr. Subkow: Is your Honor familiar with the terms "tubing block" and "bailer" and——

The Court: I am familiar with "bailer." You might state them for the record.

Mr. Subkow: Will you explain your terms?

The Witness: Yes. These derricks are carried strung up at all times. In other words, the traveling block, which I call the tubing block, because it handles the tubing——

(Testimony of Cleon James Moon.)

The Court: It pulls it out of the well?

The Witness: Yes. What it does, it provides a mechanical advantage, due to the number of lines up from the main drum, around and around the crown block and the traveling block. It's just a block and pulley system.

The Court: Yes. Well, this derrick, this portable derrick is always rigged to go to work, is that it?

The Witness: That's right. It's always rigged ready to go to work. And the blocks are carried in the structure. And when the mast is erected it is tilted forward slightly so that the block will clear the mast. And then on the bottom of the block there is a hook located, and on the sides there are what we call "elevators" and "elevator links." [16] It amounts to merely a gripping mechanism, which is fastened around the end of the tubing so that the tubing may be pulled.

Q. (By Mr. Subkow): Mr. Moon, is the derrick, when it is erected, the same length as shown in the photograph?

A. No, it is not. The derrick is roughly twice the length when erected that it is as shown in the photograph. Actually, it isn't quite twice because there is a telescoping lap between the two sections, and the derrick is not completely telescoped.

In the photograph shown in Exhibit No. 12, the length of that derrick extended is about 98 feet; whereas the length of it collapsed is about 58 feet.

Q. Are there means provided to extend that derrick when it is erected?

(Testimony of Cleon James Moon.)

A. Yes. Means were provided to extend this derrick by means of a very small extending winch driven by the same power that drove the hoist drums and drove the vehicle over the road.

Q. That is, after the derrick is erected it is extended by pulling out one section from the other?

A. That is correct.

Q. What is the section that you pull out and extend called?

A. We call that the inner section or the [17] upper section. Whereas the outside section is called the outside section and the lower section. Usually on our shop drawings we specify upper section and lower section.

Q. Can you describe how this unit is positioned at the well?

A. Yes, I can. When a well needs servicing, the driver approaches the well site by driving toward it with this unit. And if space permits—and in this particular instance this country was thoroughly flat—he goes by the well site and backs the unit toward the well in much the same manner as you would park a car in a parking space along the curb.

Now, he has to be very careful when he is doing that, because as far as his position is concerned he is essentially blind. He cannot see the well head. And he frequently will stand on the running board with the truck in low gear and will have one or two spotters at the well head with devices such as a measuring wand of some kind measuring the distance of the back end of the machine to the well

(Testimony of Cleon James Moon.)

head. He will jockey back and forth until he gets the unit centered up and the proper distance from the well head.

Q. What is the importance of this careful positioning?

A. The importance of careful positioning was that he had to have the blocks centered within a very short distance, an inch or two, of the center line of the well. In the case [18] of the pumping well it would be the polish rod. The polish rod is fastened to the string of rods that pump the well.

The reason for that is that if it was off center it would put an eccentric load on the crown of the mast.

Q. What is the "crown of the mast"?

A. The crown of the mast is the crown block at the front end of the mast. In this case, the top end. [19]

Q. Are those the pulleys that appear——

Mr. Subkow: Your Honor, may I approach the witness to look at that?

The Court: You may.

Q. (By Mr. Subkow): Is that the pulley that appears at the extreme end?

A. That is the pulley that appears at the extreme end. If you were not directly over the well an eccentric load would be applied to the mast, and if sufficiently large, could cause eccentric loads to go down through the structure and load one side of the mast more than another.

Furthermore, it has another disadvantage. It

(Testimony of Cleon James Moon.)

causes excessive line wire or excessive flange wire on the sides of the pulley in the crown.

Q. Now, in order to permit spotting, have aids been employed? In this connection I call your attention to Exhibit 9.

Mr. Subkow: Will you hand Exhibit 9 to his Honor?

(The document was handed to the court.)

The Witness: Yes.

Q. (By Mr. Subkow): Will you describe what Exhibit 9 shows?

A. On some locations some operators would make concrete mats which had curbs, which are shown about the rear wheels in Exhibit 9. This curb had two advantakes. It lined [20] up the back end of the truck in line with the well, and it acted as a stop, so that it was unnecessary to make an accurate measurement from the center line of the well to the back end of the vehicle.

Q. Is this an ordinary and usual provision at well heads?

A. Not all operators use them. Some of them do. Some of them don't. This photograph was taken in West Texas, where there were many of them.

Q. Now, by the way, the drivers who drive these trucks, are they professional truck drivers?

A. No, usually the head well puller drives the vehicle, and not being a professional truck driver, sometimes with certain types of vehicles it is something of a rather difficult thing for him.

(Testimony of Cleon James Moon.)

Q. I hope I don't make trouble for the oil companies with the unions by this question.

A. The oil company workers in California are unionized, anyway.

The Court: I suppose the size of the truck is involved, that the truck can't carry many passengers, and every passenger must count, so that it is more important to have him a good oil well worker than a good truck driver; is that correct?

The Witness: In some cases they have used people in their [21] organizations who were in the transportation department when a vehicle was exceptionally difficult to spot. Ordinarily, on level locations they would use the well crew.

Q. (By Mr. Subkow): Now, we have posted the unit at the well head. What happens next?

A. The derrick is secured to the ground, or——

Q. Now, just a moment, sir. Let me point out that you have just arrived at the well head. Your derrick is on the truck, I presume. What is the next step in the operation?

A. Well, concerning the raising operation, in the case of Franks, and that is the one we are discussing, the one in Exhibit 12 and the one in Exhibit 9——

Q. Does that include 13?

A. Yes, and 13, the mast was erected to slightly over-center. It was tilted over-center, oh, three to four degrees. That was a variable thing with the Franks. You could adjust it. It was erected by means of a power screw mechanism.

(Testimony of Cleon James Moon.)

Q. Just a moment. Exhibit 13 shows the derrick in what posture?

A. In the partly erected posture.

Q. Will you turn to Exhibits 10 and 11. Do these exhibits illustrate the form of screw lifting mechanism to which you have made reference?

A. Exhibit 10 shows a form of portable derrick.

The Court: That is the White patent?

The Witness: The White patent, used or patented by Carl White, Jr., and assigned to Franks Manufacturing, and concerns largely the latching arrangement of the derrick, although it does show the screw raising mechanism for such a derrick, as is shown in Exhibit 11 of the Woody patent.

The Court: Where is that in one of the drawings?

Q. (By Mr. Subkow): Will you identify it by reference to the drawings, and the numbers, and describing how the structure operates to erect the derrick, referring to the exhibit number in doing so.

A. Looking at Exhibit No. 11, since it pertains primarily to the screw raising mechanism, you will notice that a long channel frame 15——

The Court: In Figure 1?

The Witness: ——in Figure 1 is located above the truck bed, the number of which I cannot find. Apparently the truck is all called Item 3.

Q. (By Mr. Subkow): May I point out Item 2? Are you talking about the Woody patent?

A. Yes, I am talking about——

(Testimony of Cleon James Moon.)

Q. May I call your attention to Item 2, towards the front end of the truck bed.

A. In Figure 1?

Q. In Figure 1 and in Figure 2. Are we looking at the [23] same thing?

A. No, Figure 2 is not the truck frame. Figure 2 is an extension of the raising screw channel 15. The truck frame is below that channel. The two are stacked one on top of the other.

The Court: It is perfectly obvious that the truck frame is, I think.

The Witness: Yes. Now, on top of that truck frame and located in this channel and channel extension previously mentioned is a long drive tube, and I am afraid here I will have to refer to Figure 7, No. 25, long drive tube 25, which drives a drive nut 23, which is housed in a housing 22, and rotates on ballbearings that are not numbered. This drive tube drives the drive nut, and then fastened to the drive nut or passing through it is a long screw shown in Figure 4, and called out as 19.

Figure 4 is one of the best graphic descriptions of the mechanism. Secured to the end of the drive screw 19 is a crosshead 14, with rollers 16 riding in the channel 10, or 15—I am sorry—10 is an extension of the channel, and secured to the crosshead is a raising arm 18. This raising arm is then secured to the bottom of the mast, so that when the drive screw is rotated by power from a sprocket at the end of the drive tube—that sprocket is on the opposite end of 27 in Figure 1; 27 is a bearing block

(Testimony of Cleon James Moon.)

[24] and is not further described except that the sprocket is turned by power from the truck engine. As the sprocket is turned, the tube turns, and that retracts the raising screw, and in turn pulls the derrick up about the hinge 4 in Figure 1.

Q. Mr. Moon, is the Item 14, which is this cross-head block, shown in the original position where it starts to raise the derrick on Figure 1 of the Woody patent? A. Yes.

Q. Which one is it? It is the dotted line?

A. The dotted line is the original position.

Q. All right. Then do I understand when you say retracted, it moves from this position to the full position for the fully erected position?

Mr. Kenway: Your Honor please, I don't want to interfere with my brother's presentation of the case, and I had expected by this time that something would come out to tie this matter of this Woody patent into the issues, but I now object. It seems to me to be entirely irrelevant and immaterial to the issues we are trying here.

The Court: The purpose of it is?

Mr. Subkow: Is to show the background of what this man has accomplished.

The Court: To show what was the art before?

Mr. Subkow: And what has been done. Why we are asking [25] your Honor to sustain this patent. That is at least one reason.

The Court: Very well. Overruled. You may proceed.

The Witness: The mast is erected to the vertical

(Testimony of Cleon James Moon.)

position by retracting the screw into the tube, and by rotating the tube. After it arrives to a near vertical position, passes over-center, the mast is then extended. It is extended by means of a small body winch and a cable mechanism which——

Q. (By Mr. Subkow): Is that shown?

A. That is not shown in the Woody patent. It is shown in the White patent, Exhibit 10.

In this case the extending winch 25 actuates cable 24, which passes under guide sheave 27 and 21.

The Court: Over 21?

The Witness: Over 21.

Q. (By Mr. Subkow): Where is 21 in Figure 1?

A. In Figure 1 goes up the inside of the outside section, and—— [26]

Q. Is that shown in one of the figures of the White patent?

A. It is shown in Figure 1.

The Court: The inside of the outside section of the derrick.

The Witness: It goes up the inside of the outside section of the derrick until—referring to——

Q. (By Mr. Subkow): May I call your attention to Figure 4?

A. Yes. Until—referring to Figure 4 and to Figure 3A. It goes over sheave 22, back down around the outside of the inside section and across sheaves 23 on each side and back up to a dead end at 28.

Now, as the winch is rotated, winch 25 is rotated, shortening the cable, the upper section is extended

(Testimony of Cleon James Moon.)

until it reaches the top, or near the top, of the lower section, at which place a locking mechanism is actuated which locks the two sections together.

Q. Now, during the period that the derrick is raised through the posture shown in Figure 13, and between the posture shown in dotted lines and in full lines in the Woody patent, 2,204,716, what happens to the back end of that truck?

A. The back end of that truck suffers a very severe deflection. Now, we had—— [27]

The Court: Causes a downward pressure on it?

The Witness: No. At the start the deflection is upward, and it continues upward until the center of gravity of the mast approaches the hinge point of the mast erecting structure.

Now, that hinge point is shown at Figure 3 in the Carl White patent.

Jacks were provided, which are not shown in the patent but are shown in photograph 9, to stabilize that rear end. However, because the force was upward rather than downward, these jacks left the ground until about two-thirds of the erection was accomplished.

Q. (By Mr. Subkow): Can you explain why that was lifted?

A. It was lifted because the raising arm 4 had to lift the mast of the derrick 2, reading from the Carl White patent. And since this member is in tension, and since the center of gravity of the mast is well behind 3, we had a downward force due to

(Testimony of Cleon James Moon.)

the center of gravity ahead of the hinge point and an upward force behind the hinge point.

This upward force was of such a magnitude as to cause the frame to deflect several inches. In fact, it was not unusual for these jacks to be off the ground as much as four inches.

I had to repair one of these masts—the first one that the Shell Oil Company obtained in California—because [28] the jacks were off the ground and, consequently, were inadequate to stabilize the structure; and the springs on one side of the vehicle failed and caused the mast to overturn. I repaired that mast, I believe, in 1942 at Dominguez.

Mr. Subkow: Now, your Honor, at this point, in accordance with the permission given me, I would like to read into the record an admitted fact. It will save some time.

This is Item 16 of the Pretrial Conference Order, Item III.

“Conventional trucks as used in the construction of back-in units in which the derrick was carried to be hinged on the rear of the vehicle were not suitable to carry heavier derricks of the telescopic type. Not only were there structural characteristics insufficient, but the weight distribution was also unsuitable for engineering and legal reasons; the legal reasons being the necessity for compliance with the various highway codes of the various states. In building the drive-in units in which the derrick is hinged at the front of the truck it became feasible to custom build the unit to obtain a weight distribu-

(Testimony of Cleon James Moon.)

tion which would be desirable and which would satisfy both engineering and legal requirements for such structure.”

Your Honor, at this point I would want to go into that [29] aspect of the case. And this may be, with your permission, an appropriate time to adjourn for lunch.

The Court: Very well. We will take the noon recess until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [30]

Tuesday, March 25, 1958, 2:00 p.m.

The Court: Ex parte matters?

The Clerk: No ex parte matters, your Honor.

The Court: You may proceed.

Mr. Subkow: Will you resume the stand, Mr. Moon.

CLEON JAMES MOON

the witness on the stand at the time of the noon recess, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Lyon: If the court please, the stipulation which I promised has been handed to your clerk.

The Court: Very well. I have it before me.

Mr. Subkow: Your Honor, at the termination of the morning session I read a paragraph into the record of the admissions.

The Court: About complying with the traffic laws?

Mr. Subkow: Yes, sir. Now, your Honor, we

(Testimony of Cleon James Moon.)

have a Vehicle Code book for the year 1949, and I believe the law was no different in 1948 and 1947 on the points that we were discussing. The Vehicle Code refers to certain technical matters, and while I understand that you can't interrogate a witness as to the meaning of the law, this [31] law is so much a matter of techniques that are involved that I thought it might save time instead of going through the formal matter that I shortcut it and ask him certain questions with respect to the requirements of the law, which would bring out the problems which were faced by these people in designing and transporting vehicles.

I have consulted with opposing counsel, and the informal manner seems to be the practical way to proceed.

The Court: Yes, or you can ask the witness if the law was so and so.

Mr. Subkow: Then may I hand the witness the Code?

The Court: Or what his understanding of the law was at that time, and then the court will take judicial notice of what it was.

Mr. Subkow: Thank you. It is unnecessary to mark this as an exhibit, because it is an official document, and the court can refer to it.

The Court: He may testify on the assumption that the law was so and so, according to his understanding.

Mr. Subkow: Then may I hand this to the witness?

(Testimony of Cleon James Moon.)

The Court: Yes, you may.

(The document was handed to the witness.)

Q. (By Mr. Subkow): With reference to the Vehicle Code which I handed you, Mr. Moon, will you tell the court what requirements were imposed upon designers and users of portable [32] derrick equipment in order to employ the public roads of California?

The Court: As of what time?

Mr. Subkow: As of the years prior to the date of your invention, December 12, 1946.

The Court: In other words, the purpose of this is to show the problems confronting the industry at that time?

Mr. Subkow: That is right.

The Court: Very well.

The Witness: The Vehicle Code had limitations with respect to weight, height, length and width.

In the case of width, the load could not exceed 96 inches, and the width of the vehicle at the tires could not exceed 100 inches.

In the case of height, the load or the vehicle, or the combination of both, could not exceed 13 feet 6 inches.

In the case of length, the load mounted upon the vehicle could not exceed 60 feet, with one exception. There was an exception that certain types of loads could be carried which were 75 feet long. [33]

Mr. Subkow: Did that type of load include portable servicing and drilling masts?

The Witness: Yes, sir, that type of load in-

(Testimony of Cleon James Moon.)

cluded portable drilling and servicing masts separately carried.

Q. (By Mr. Subkow): Did it include it when mounted upon the truck such as shown in your Exhibit No. 12? I believe it is No. 12.

A. Exhibit No. 12, the photograph. The legal limit of that was 60 feet.

Q. Proceed, Mr. Moon.

A. The front overhang limit was to be no greater than three feet in front of the vehicle bumper. The rear overhang could be two-thirds of the wheel base. And in California the wheel base is considered the distance between the front wheel and the rear wheel.

Now, in some states it is considered the distance between the center line of the front wheel and the center line of the rear two wheels.

As far as load was concerned, that was on a formula basis, based upon wheel base, and single axles, and tires. And starting out with the tires, no tire or wheel could carry more than 18,000 pounds.

I would like to correct that. No tire could carry more than 9,000 pounds. No single axle could carry more than 18,000. The combination of axles, such as at the rear, was [34] based upon a wheel base loading, and for a four-foot axle spread, and at that time it was 30,800 pounds.

Now, this 1949 vehicle code shows 32,000 pounds. That was changed at that time. At the time of the design we were operating on the '46 code, at the

(Testimony of Cleon James Moon.)

time of the invention. And a four-foot spread between the axles, 30,800 was the legal limit.

Then in addition to that the formula applied to the wheel base between the front wheel and the rear wheel. Now, on a 240-inch wheel base vehicle such as this is——

Q. “This” referring to Exhibit No. 12, Mr. Moon?

A. Yes, to Exhibit No. 12. The allowable load on that vehicle would be 51,200 pounds.

Now, that’s again on the 1949 code, and I believe the code stayed the same on the over-all wheel basis.

Mr. Subkow: Does your Honor wish to look at the Vehicle Code?

The Court: No. Thank you.

Mr. Lyon: I think it would be a good time to remark that as far as I have heard from the evidence you haven’t identified that as the California State Vehicle Code.

Mr. Subkow: Well, if I haven’t I apologize. We have been referring to the California Vehicle Code. The witness has in his hand the Vehicle Code of the State of California for the year 1949. [35]

Q. (By Mr. Subkow): Now, were back-in units manufactured by others than Franks Manufacturing Company prior to December 12, 1946?

A. Yes.

Q. Did they also have the same problems with regard to legality that Franks had for their truck-mounted units?

(Testimony of Cleon James Moon.)

A. Well, the law applied to everyone.

The Court: I would assume that they would all have problems of weight, problems of visibility, and problems of highway clearance. I suppose they are the law in practically every state, aren't they?

The Witness: Yes. They are not the same laws, but there is a law.

The Court: There are restrictions.

The Witness: There are restrictions.

Mr. Kenway: Am I correct in understanding that this testimony is directly solely to the laws as they were in California?

Mr. Subkow: They have been up to this time.

The Court: As I understand the purpose of it is to show the problems confronting this industry at that time.

Mr. Kenway: I wasn't objecting. I just wanted to make sure that it was only the California laws that the testimony referred to. They are somewhat different in other states.

The Court: Yes. But I merely observe that I would [36] assume that anyone that was attempting to work with a device such as this would be confronted with weight problems, with visibility problems and highway clearance problems in every state where you enter upon the highway.

Mr. Kenway: Yes, sir.

The Court: And those problems, I suppose, would vary in degree and kind—would vary in degree but not in kind in different states.

The Witness: That's right.

(Testimony of Cleon James Moon.)

Mr. Subkow: The purpose of my last question was to extend the consideration to other states, as well, without going into detail meticulously with the provisions of each of the states.

We have had an admission with regard to the legality with regard to these units in other states.

The Court: And without regard to the law of the state, I assume, consistent with strength, that it would be economically and otherwise desirable, to make the derrick as light weight as possible and practical.

The Witness: That's correct. They are made in several sizes, and every effort has been required, actually, to try and make the units legal.

The Court: What are they made out of? Aluminum?

The Witness: No. Some of the recent ones have been made out of aluminum. This particular mast was made of [37] seamless cold drawn alloy steel tubing.

The Court: That was back in 1940——

The Witness: Well, this one refers to a time around 1942, Exhibit No. 12 does. The tubing was quite similar to the tubing used in aircraft.

The Court: Hollow?

The Witness: It was hollow, and was high strength. It had a yield point double that of mild steel—more than double.

Mr. Subkow: May I be permitted to repeat my question? Perhaps it is duplicating, but it helps me pick up my line of thought.

(Testimony of Cleon James Moon.)

The Court: Yes.

Q. (By Mr. Subkow): Did Franks have competitors prior to December of 1946 who also manufactured these portable back-in derricks mounted on trucks? A. Yes.

Q. During your connection with Franks—which is a shorthand terms for Frank Manufacturing Company—do you know whether there were any requirements or requests by customers of Franks for the production of portable units which would comply with the state laws and avoid trouble with the highway authorities?

A. Yes. There was a continual requirement there. Almost every inquiry that was received from any customer, [38] particularly the major oil companies, requested that we either make the unit legal, or we try to make it legal. Some orders were lost because we could not make it legal.

The reason I mention major oil companies is because the major oil companies have a great number of fields widely separated, and they can move these units from one field to another. Consequently, it is desirable to use the state highways for transport. Some companies, where they have a sufficient number of wells on one lease to keep one unit busy, are not quite so interested in legality, since they do not plan to get it on state highways.

But, generally speaking, it was a requirement that the units be made legal. [39]

Q. Now, Mr. Moon, did it mean necessarily that because these units were illegal as not meeting the

(Testimony of Cleon James Moon.)

requirements of the law that they were bootleg units and could not be used?

A. Not at all. If you have a unit that is overweight, and, for that matter, illegal in other respects, but principally overweight, it is possible in the State of California to obtain a permit to move that unit. However, that permit is restrictive. You can move the unit only during week days in the day time. You cannot move it at night, on weekends, holidays, or in bad weather.

Consequently, when an operator had a well down and wanted to get it back on production very quickly, if the unit was an illegal unit, he was faced with a handicap. He had to wait until the time was proper for movement.

The Court: Or take his chances?

The Witness: Well, or take his chances. I suspect that some of them took their chances.

The Court: He would not be the first overweight vehicle on the highways of California.

The Witness: Certainly not.

Mr. Subkow: At the present time I would like to read into the record the answer of Cabot Shops, Inc., served February 21, 1958, to plaintiffs' interrogatories. Due to the stipulation that was just presented, it will be [40] unnecessary for me to distinguish between the answers of the various defendants. I will now read——

The Court: Who are the various defendants? You know, with this practice of putting "et al." on, you lose——

(Testimony of Cleon James Moon.)

Mr. Subkow: We struck the other defendants out by interlineation, your Honor.

The Court: That is my understanding. If you move that way, however, I wonder if my memory is serving me or not.

Mr. Subkow: Cabot Shops, Inc., and Howard Supply Company.

The Court: Are the only two?

Mr. Subkow: Yes.

The Court: Then let's resolve that all other papers in this matter carry that. It will take almost as much space to write "et al.," as it will to write "Howard Supply Company."

Mr. Subkow: Your Honor, there has been a stipulation just handed to you in which Howard Supply Company, who has not yet answered, will do it now by adopting the answer of Cabot Shops.

The Court: Yes. I am speaking of the habit of putting the "et al." in the caption.

Mr. Subkow: Yes.

The Court: It would not take much more time and effort to put "Howard Supply" there, and then we would know who the defendants are. [41]

Mr. Subkow: Yes. Lawyers are notoriously lazy, your Honor.

The Court: We get habits, and the secretary takes the last pleading and she starts from there.

Mr. Subkow: That is right.

The Court: I often have cases where there are a number of fictitious defendants named, and we dismiss all of those, and then here comes pleading

(Testimony of Cleon James Moon.)

months afterward that still have the Doe defendants.

Mr. Subkow: I will resume again. I will now read the answer of the defendants served February 21, 1958, to plaintiffs' interrogatory VIII:

"Did any of the customers of Franks Manufacturing Corporation, prior to the manufacture of the Clipper units referred to in Interrogatory No. I, request that they be supplied with portable lattice derricks of the telescopic type mounted on motor vehicles which would comply with the laws of the various states regarding the movement of such vehicles over public roads? If the answer is in the affirmative, state the names of the customers and the dates of the request.

"Answer: I am certain that verbal suggestions were made from time to time. As a matter of fact, the only excuse for designing and producing the [42] telescoping derrick mast in the first place was to make possible use of a doubles mast having tolerable road lengths both from the practical usage standpoint and highway permissibility."

I will read the answer of the defendants to the interrogatories Nos. V, VI and VII, substituted by stipulation for previous interrogatories, and served March 20, 1958.

Your Honor, I have a problem here that I would like to have some disposition on. The interrogatory is responsive in one sentence, and non-responsive in the other. I wish to offer only the responsive part. I don't want to offer the non-responsive portion,

(Testimony of Cleon James Moon.)

and I will read it merely to present the problem to your Honor, and then your Honor may give a ruling as to whether the whole interrogatory should go in or only a portion.

The Court: It is your interrogatory?

Mr. Subkow: It is my interrogatory, but it is their answer.

The Court: It is competent for you to move to strike any non-responsive portion of it.

Mr. Subkow: That is the point I am raising at the present time, and I would like to have a ruling as to whether or not the whole interrogatory has to go in, or only a portion of it, so that I may determine what I want to introduce.

The Court: Very well. Which is it now? [43]

Mr. Subkow: It is the answer——

The Court: The filing date is what?

Mr. Subkow: ——of March 20, 1958.

The Court: It was filed March 21, I believe.

Mr. Subkow: Well, it was served on me on March 20th, and that is the only record date I have.

The Court: The interrogatory is what?

Mr. Subkow: It was the interrogatories, the substitute interrogatories V, VI and VII. Perhaps I can find the page for you.

The Court: Certain interrogatories were substituted by stipulation for Interrogatories V, VI and VII.

Mr. Subkow: Those are the ones I am talking about.

The Court: Now, which is it?

(Testimony of Cleon James Moon.)

Mr. Subkow: May I locate the page for you?

The Court: The document I have before me is only five pages or six pages in length.

Mr. Subkow: It is the answer which appears on page 2 of the document, beginning, "Prior to March 20, 1958,"——

The Court: It is an interrogatory numbered 2 in the document.

Mr. Subkow: No, it is——

The Court: Not Roman II, Arabic 2.

Mr. Subkow: If you will note page 1 of the document——

The Court: It is Arabic 2 of the interrogatory numbered [44] Roman I, is it not?

Mr. Subkow: No, sir, it is the answer to the entire interrogatory, all parts, beginning on page 1 of the document. You will see it says, "Comes Now the defendant, Cabot Shops, Inc.,"——

The Court: Yes, I see. I have read it. It is the entire answer to that interrogatory numbered 1.

Mr. Subkow: In all its parts.

The Court: Very well. Beginning, "Prior to March 20, 1958, defendants, Cabot Shops, Inc.," and so forth.

Mr. Subkow: Yes.

The Court: What portion do you say is non-responsive?

Mr. Subkow: The last sentence.

The Court: Beginning with "Because"?

Mr. Subkow: No, "Further answering." The

(Testimony of Cleon James Moon.)

inquiry was directed to the forms shown in Exhibit——

The Court: Is there any objection to striking it on the ground that it is non-responsive?

Mr. Kenway: No objection.

The Court: Motion granted, and that portion beginning "Further answering" is stricken. So you may offer in evidence, if you like, the other portion without that.

Mr. Subkow: All right. (Reading):

"Prior to March 20, 1958, defendants, Cabot Shops, Inc., and Franks Manufacturing Company, have [45] sold back-in units similar to those specified in said interrogatory, which units, because of excess weight on the front and/or rear axles and wheels and the front overhang, did and do not comply with the laws of California, Oklahoma and Texas, and do require special permission for moving. Because there were no scales available prior to 1942, it cannot definitely be ascertained whether units sold prior to 1942 did and do fail to comply with the laws of other states."

There is an ambiguity in that answer. The statement of the answer reads that they did and do not comply. I assume the answer to mean that they did not and do not now comply.

The Court: I will so read it. Is that correct, gentlemen?

Mr. Kenway: Yes, your Honor.

Mr. Subkow: I will now read the further admissions of fact before testimony. This comes from

(Testimony of Cleon James Moon.)

the pretrial conference order. It is Item III, 12, and is an adoption of a statement in the plaintiff's pretrial statement of facts. I will read the portion which was adopted:

“Defendant's predecessor, Franks Manufacturing Company, for long prior to the construction by Franks of its first Clipper unit had knowledge of the illegality of back-in units.” [46]

Q. Mr. Moon, while you were employed by Franks, and afterwards when you were selling Franks' units, did Franks make any efforts to supply a legal unit, to your knowledge?

A. Only to the extent that they tried to make units as light as possible, and arranged as well as could be arranged on large custom-built trucks.

Q. Did they succeed in these efforts?

A. No. [47]

Q. Were there any efforts made by manufacturers to supply legal mobile equipment for like or analogous services other than truck-mounted units?

And I show you, in this connection, Exhibits 15, 16 and 17.

Mr. Subkow: Would you please be good enough to show that to the witness?

The Court: They are photographs?

Mr. Subkow: No. One is an article. 15, 16 and 17.

The Court: Do you wish these placed before the witness?

(Testimony of Cleon James Moon.)

Mr. Subkow: The witness has his own copies, your Honor.

The Court: Have they been received in evidence?

Mr. Subkow: They have not been offered.

The Court: Will you hand them to the court, please?

(Whereupon the documents were handed to the court.)

Mr. Subkow: May I have a stipulation that Exhibit No. 15 is a page from a Franks catalog, which on my exhibit sheet is identified as a 1940 catalog, Franks catalog?

Mr. Kenway: Page 10?

Mr. Subkow: Yes. I believe that is what my records show.

Mr. Kenway: Yes, that is correct.

The Court: Received in evidence. Exhibit No. 15.

(The exhibit referred to marked Plaintiffs' Exhibit 15, was received in evidence.) [48]

Mr. Subkow: Will you identify No. 16 for the record, Mr. Moon?

The Court: Aren't these covered by a stipulation in the pretrial order, these documents?

Mr. Subkow: Well, your Honor, in the pretrial order the stipulation had nothing to do with the admissibility in evidence. There is merely a list of them.

The Court: Well, does the stipulation cover the foundational facts?

(Testimony of Cleon James Moon.)

Mr. Subkow: Of these——

The Court: The genuineness and due execution of the documents.

Mr. Subkow: No, sir, it does not.

The Court: I am sorry I overlooked that. I never would have signed it. We are spending a lot of time with this. All this should be covered by stipulation.

Mr. Subkow: It really should be.

The Court: There is no question about it. We are just wasting a lot of time. It's just like playing paper dolls here. All of them should go in evidence in one statement, unless you have some real genuine issue with respect to it.

Mr. Subkow: Well, your Honor, of course this must be said: That as a result of all these admissions the exhibit situation changed materially. I had 140 exhibits, and I have cut a third of them out. [49]

The Court: But this should have all been settled before you came to court.

Mr. Subkow: Well, will you identify Exhibit 16?

The Court: Exhibit No. 16 is a brochure of the Westinghouse Electric Corporation, as I understand it. Is it stipulated to be genuine and in all respects what it purports to be?

Mr. Kenway: Yes, your Honor.

The Court: Received in evidence.

(The exhibit referred to marked Plaintiffs'

Exhibit 16, was received in evidence.)

The Court: Exhibit No. 17 is what?

(Testimony of Cleon James Moon.)

Mr. Subkow: A brochure.

The Court: A brochure by Waldrip. Is it stipulated to be genuine and in all respects what it purports to be?

Mr. Kenway: There is just one point there. It bears no date. I would like to include that in the stipulation.

The Court: Well, it doesn't purport to have a date.

Do you want to offer a date?

Mr. Subkow: This has been in the affidavit before you on the summary judgment.

The Court: Can you stipulate to a date, or about when?

Mr. Subkow: I will ask the witness. What date would you give for this exhibit?

The Witness: I would say that it was printed in early [50] 1948.

The Court: Do you accept the stipulation?

Mr. Kenway: 1949?

The Court: 1948. Early 1948.

Mr. Kenway: Yes, your Honor, I do.

The Court: Stipulated to be genuine? It's received in evidence. Exhibit No. 17.

(The exhibit referred to, marked Plaintiffs'

Exhibit 17, was received in evidence.)

Q. (By Mr. Subkow): Mr. Moon, will you, using these exhibits, state briefly the nature of these structures which are referred to and the purpose which they were intended to serve?

A. Yes. This type of a structure——

(Testimony of Cleon James Moon.)

The Court: Refer to the exhibit when you do so.

A. —shown in Exhibit No. 15 is another approach to make a drilling rig mobile and, in certain aspects, legal. This particular mast shown in Exhibit No. 15 could be broken down into legal pieces and carried separately.

The draw works and engine unit, which was mounted on a skid, could likewise be carried separately as a legal package.

Q. Will you refer to Exhibit No. 16 and No. 17, and state—first, as to Exhibit No. 16, state what the nature of this type of unit was? [51]

A. This is another type of unit where the mast is carried separately. And in this case the mast shown on the cover of Exhibit No. 17 was built in 1946; and in Exhibit 16, Westinghouse Electric Corporation wrote an article concerning the use of the mast and the drilling rig. And in that article they make the statement that the “hook load capacity of the derrick is 300,000 pounds and it’s the first of its type having such a capacity that can be moved over the highway in a single legal package. The derrick with block strung may be compacted into a single 8 by 8 by 63 foot piece for legal moves over the highway. The weight of the entire unit is approximately 36,000 pounds.”

Q. Will you state where you read that statement from?

A. That is from Exhibit 16, page 3, the right-hand column, the second paragraph.

(Testimony of Cleon James Moon.)

And continuing to page 4, the left-hand column, and the continuation of the paragraph.

Q. Will you read the statement for the record?

Is that all? A. Yes.

Q. I call your attention to page 6, the left-hand column. Is there any statement there that is significant as to this feature?

A. Yes. This again concerns the problem of making legal packages that can be carried on the highway. [52]

“In considering the drilling base, Shell desired one that could be constructed in four pieces, would be light in weight, and so designed that it could be moved in legal loads on a single semi-trailer.”

This entire rig was arranged so that it could be broken down into legal-size packages.

Q. Mr. Moon, I hand you Exhibit No. 1, which is a copy of the patent in suit, 2,671,537, and will you state, by reference to this patent, how you arranged in your design to solve these problems?

First, I will ask you whether the structures as described in this patent were your first thoughts in the solution of this problem?

A. No, they were not. In the December 12th—no. In the November 5, 1945 version of this design, I had endeavored to use a screw mechanism that I had previously designed.

Mr. Subkow: May I ask the clerk to hand Exhibit No. 18 to the court?

(Whereupon the exhibit was handed to the court.)

(Testimony of Cleon James Moon.)

Q. (By Mr. Subkow): Will you identify this document?

A. Yes. This is a drawing which I prepared on or before November 5, 1945, in an effort to resolve the requirements of building a drive-in unit. At that time I had a [53] screw-raising design, and later a patent application on it, whereby the mast could be raised by means of a screw-raising system different than that from Franks, but still embodying the safety features that Franks had in their design.

Mr. Subkow: Now, may I ask the clerk to hand Exhibit 19 to the court?

The Clerk: The clerk doesn't have Exhibit No. 19.

The Court: Is that the Moon patent, 2,538,958?

Mr. Subkow: Yes.

May I offer Exhibit 18 in evidence?

The Court: Is there any objection to that?

Mr. Kenway: No objection.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiffs'

Exhibit 18, was received in evidence.)

Mr. Subkow: May I offer No. 19 in evidence?

The Court: Any objection to the Moon patent, 2,583,958, the flat copy?

Mr. Kenway: Yes, I object to it as being immaterial. I don't know what the purpose is.

Mr. Subkow: It will appear.

The Court: Is it prior to showing the surrounding circumstances?

(Testimony of Cleon James Moon.)

Mr. Subkow: Yes, your Honor.

The Court: Received in evidence. The objection is overruled. [54]

(The exhibit referred to, marked Plaintiffs' Exhibit 19, was received in evidence.)

[See Book of Exhibits.]

The Witness: May I continue?

Q. (By Mr. Subkow): Please continue, Mr. Moon.

A. When I started to develop the components to be used in this machine, I discovered that I had far too much weight on the rear wheels and that it would be necessary to move the hoist drums forward with respect to the front and rear wheels. The center of gravity of this mast and the hoist drums and the engine all overloaded the rear wheels. Consequently, it was necessary to move some of that weight forward.

That made it impossible to use this screw-raising mechanism for the simple reason that there wasn't enough room. So I then decided to go to a hydraulic cylinder system for erecting the mast. That, in turn, permitted me to move the components nearer the cab.

The Court: That would be forward?

The Witness: Yes, that would be forward.

Mr. Subkow: May I have Exhibits 20 and 21?

Your Honor, we offer a large drawing, which is Exhibit No. 20, and we have a reduced print of the same drawing. It will be much more con-

(Testimony of Cleon James Moon.)

venient to use the reduced print, but we offer the large drawing for the purpose of the record.

The Court: Is there any objection to it? [55]

Mr. Kenway: I am at somewhat a disadvantage, your Honor, because I didn't see these until this morning. I am very sorry this whole thing came up.

Mr. Subkow: May I say that your associates have seen this thing many times before.

Mr. Kenway: No objection.

The Court: Received in evidence as Exhibit 20. And the reduction of it will be Exhibit 20-A in evidence?

Mr. Subkow: Well, it's in the record as 21, your Honor, so we won't disturb the order.

The Court: Exhibit No. 21. I see. All right. Both 20 and 21 are received in evidence.

(The exhibits referred to marked Plaintiffs'

Exhibits 20 and 21, were received in evidence.)

Mr. Subkow: Will you hand the Exhibit 21 to his Honor?

(Whereupon the exhibit was handed to the court.)

Q. (By Mr. Subkow): Now, I notice, Mr. Moon, that there was a hiatus of almost a year between the date of Exhibit No. 18 and Exhibit No. 21. What caused this hiatus?

A. Well, several things. First, we had to start the fundamental design, the basic design of the mast, the drums, the automotive transmission equipment, the chassis and the means of erection. All of

(Testimony of Cleon James Moon.)

these influenced the weight and balance on the wheels.

As soon as the picture began to develop it became more [56] and more obvious that we would never make it with our screw-raising mechanism. So we had to backtrack a little and consider other means. That other means turned out to be a hydraulic cylinder mechanism. We had about two men besides myself working on this during that year, working out the very first design concept. And that is why there was about a year of elapsed time. [57]

Q. Now, referring to Exhibit 21, and the patent, I notice that there is a similarity between Figure 1 of the patent and this,—

The Court: Which patent, now? We have to keep in mind that there are many patents around here.

Mr. Subkow: The only patent that is of great significance to me, and that is the patent in suit, 2,671,537.

The Court: Exhibit 1.

Mr. Subkow: Yes. There is no answer to my question, I believe.

The Court: No.

Mr. Subkow: Will you read the question, please?

(The question was read.)

Mr. Subkow: There is no question, I see.

Q. Is there not?

A. Yes, there is a similarity.

Q. Well, using either of the two, the patent or the exhibit, will you describe the construction of the

(Testimony of Cleon James Moon.)

structure which was made on December 12, 1946, and which is embodied in the patent?

A. The structure——

The Court: In Figure 1?

Mr. Subkow: Well, the witness will undoubtedly say, your Honor.

The Court: What confused me was the concluding words [58] of your question. You said, “and which is embodied in the patent.”

Mr. Subkow: Yes, that is right, and I dropped my voice.

The Court: That assumes a fact not in evidence. He says there is some similarity, but I don't know whether that means that is something embodied or not.

Mr. Subkow: The witness will specify.

The Court: Which exhibit are you asking him to refer to? 21 and 1?

Mr. Subkow: Yes.

The Court: You will be surprised what you find when you sit down to read these records.

Mr. Subkow: Yes. I am very grateful, your Honor.

The Court: How I can read just page after page, and they can mean absolutely nothing, because you don't know which figure you are talking about or which exhibit.

Mr. Subkow: I know. I am very grateful to your Honor for the correction.

The Witness: Looking at Exhibit 21, then, and Exhibit 1, Figure 1, we see a chassis, comprising

(Testimony of Cleon James Moon.)

rear wheels, front wheels, an erection means, and a derrick positioned on derrick supporting members, a hinge positioned on derrick supporting members,——

Mr. Subkow: May I interrupt, your Honor? May the witness be instructed in describing this to refer to the [59] numbers in the patent, if he is referring to the patent, and it will clarify the record, I believe.

The Court: Yes, that would be helpful. If you are referring to Exhibit 21, the drawing on which the components are not numbered, you cannot say, but if you are referring to any corresponding number on Exhibit 1, Figure 1, the patent in suit, please tell us the number of the component.

Mr. Subkow: And may your Honor also amend your instructions to permit him to refer to other numbers in the patent, if they will help to clarify the matter?

The Court: Yes.

The Witness: Very well. Both of them consist of a chassis 11, shown in Figure 1; rear wheels 8, shown in Figure 1; front wheels 9, shown in Figure 1; an erection means shown at 27 and 28 in Figure 1; a cab, shown at 10 in Figure 1 and in Figures 3 and 4 and 6; a supporting means for the derrick shown at 14 in Figure 6, with unnumbered members adjoining the member 14; a hinge positioned on the mast 19 in Figure 1, and positioned——

Q. (By Mr. Subkow): Just a minute, Mr. Moon.

A. Yes.

(Testimony of Cleon James Moon.)

Q. You said the hinge was 19?

A. No, I said the mast was 19. Isn't that correct?

Q. I am sorry. I misunderstood.

A. (Continuing): A mast positioned on a hinge 21 and [60] 22, and it is a clamp type hinge; a mast cross-tube 17 being clamped into that hinge.

Q. May I inquire what 17 is?

A. Perhaps I had better refer to the text of the patent:

"Pivotally mounted inside the bearings 16 is the tubular cross member 17."

——the tubular cross member 17, which rides inside of the bearing cab assembly 16.

Q. May I call your attention to Figure 11?

A. Figure 11 is a detail showing the mast support tubes, with an overhead framing 15, tied into bearing assembly 16, through which the tubular member 17 runs. Tubular member 17 is secured to the mast and the mast is positioned at the hinge 16.

Q. Looking at Figure 6, there are some unnumbered members which extend from the bracket 26 at an angle, and a vertical member which extends downward from the apex.

A. Those are bracing members designed to carry the forces into the chassis from the hinge point and adjoining the vertical or near vertical members 14.

Looking at Figure 4, it will be noted that the rear derrick legs 34, and above the hinge and continuing below from a portal or window, through which the

(Testimony of Cleon James Moon.)

driver may view the road and the well head through the windshield.

Q. Where is the driver's position? [61]

A. The driver's position is where the driver sits at the automotive controls behind the steering wheel, or with parts of him along the steering wheel. In any event, it is the position from the front of the seat to the pedals, where he has control of the unit, as is conventional in trucks. In fact, the patent states that——

Q. Identify the part, if you are reading from the patent.

A. Let me see if I can find it here.

Q. I call your attention to column 2, line 31, et cetera.

A. Yes. Quoting from the patent, column 2, line 31:

“The driver in his cab position, where he has, as is conventional in trucks, all of the steering and driving controls, can see the derrick moving into position at all times and thus may, if he so desires, readjust his position with great facility. Because of the fact”——

Q. All right. Were you going to read some more? A. Yes.

Q. Go ahead.

A. (Reading):

“Because of the fact that the cab is positioned adjacent the front wheels, where also the derrick is provided, the driver has an unobstructed view of the location where the derrick is to be erected. [62]

(Testimony of Cleon James Moon.)

The improved visibility imparts a surer control by the driver who is in control of the lifting mechanism."

Q. Now, in the design, as indicated, it was proposed to put the lifting controls inside the cab?

A. We considered it during the early steps of the design. However, when we actually built some of these machines, we found it more convenient to put the controls on the outside of the vehicle, even though at times he might partly erect the derrick and get back into the vehicle to make a change in its location.

Q. Now, continue with your description, Mr. Moon.

A. Also included was the engine 4, shown in Exhibit 1, at the rear of the vehicle, and the necessary transmission equipment to the wheels and to the hoist drums, which are shown at 6 and 7, located between the engine 4 and the cab 10.

Additionally, and I believe I have mentioned this before, the erection means 27 and 28 was located behind the cab, and in front of the drum. This erection means was anchored at 25 on the chassis 11, and at 33 on the mast 19.

Q. Now, what kind of a derrick is shown in this patent?

A. This is a conventional four-legged telescopic type mast. The patent specification in column 1, line 8, I believe, or line 7, says:

"These masts are usually composed of one or more sections, usually two, in such form that the

(Testimony of Cleon James Moon.)

upper [63] section may be telescoped into the lower section."

Q. Are they the type that are disclosed in the White patent, 2,204,713, now in evidence?

A. Yes. They are quite similar. This one happens to be raised by a different mechanism than the White derrick, but, in general design, it is quite similar.

Q. Were there any modifications made of that derrick to adapt it to this design?

A. Only as was required by the mounting and the raising mechanism. If it is necessary to widen out the hinge to the extreme outside to enable us to get around the cab and to erect the mast around the cab, we had to have a portal through which the supporting structure—well, we had to have a portal through the rear structure through which we could see, and we also had to have a portal in the supporting structure so that the driver could see forward.

Mr. Subkow: Will you refer to Exhibit No. 11?

Does your Honor have Exhibit No. 11 before him?

The Court: The Woody patent? I have it.

Q. (By Mr. Subkow): Were there any modifications made in the design of the Woody patent to adapt it to this structure?

A. Yes, there were quite a few. If you will let me find my exhibit No. 11.

Excuse me. Here it is.

To begin with, we decided to design the unit from the ground up instead of using a conventional truck,

(Testimony of Cleon James Moon.)

The Court: Ball bearings?

Mr. Subkow: Well, no. The things that go inside the bushing and supports the weight. Well, I don't know.

The Witness: There is one thing I hadn't mentioned about——

The Court: The bearing is a babbitt, is that it?

Mr. Subkow: I suppose that is right. May we ask the expert on the stand?

The Court: Yes.

Q. (By Mr. Subkow): What would be the distinction between the bushing and the bearing?

A. Well, there are ordinarily two different types of bearings; the anti-friction bearings and the plain bearings. The so-called anti-friction types are your ball bearings, roller bearings and the bearings of that type—needle bearings.

Your plain bearings consist of an outside sleeve or tube with an inside bushing. The inside bushing can be bronze or babbitt, but it is a plain bearing. It has no extra working parts.

The Court: The bearing part is the bushing then.

The Witness: Well, not quite. The shaft bears against [67] the bushing. That's like the crankshaft in a car, it bears against the bushing, and the bushing is contained in a bearing cap or bearing sleeve. The whole assembly is considered to be the bearing. The bushing is merely the lining.

Mr. Subkow: May I inquire of the court when you regularly take your recess?

(Testimony of Cleon James Moon.)

The Court: Would you like to take the recess at this time?

Mr. Subkow: Yes.

The Court: We will recess for five minutes.

(Short recess.) [68]

The Court: You may proceed.

Q. (By Mr. Subkow): At the close of the session prior to the recess you identified the derrick as being a four-legged derrick. Will you identify by reference to the patent Figure 1 the various elements of that derrick?

A. May I have just a moment to check the specification of the patent?

The derrick, which consists of a four-legged telescopic type, includes legs, — rear legs 34 of the lower section, the extensions 25a of the lower sections, which are spaced transversely apart a distance greater than the driver's position in Figure 11 and Figure 4. The upper end of the lower section 18 rests upon supports or rests upon a support 20, positioned beyond the rear wheels just in front of the motor compartment 5.

Mr. Subkow: Pardon me. May I have the reporter read that? I lost the statement, and may I have the last sentence read?

(The portion of the answer referred to was read.)

Mr. Subkow: Thank you.

The Witness: Returning to legs 25, the extension of legs 25a, the distance between the ends of the

(Testimony of Cleon James Moon.)

legs 25a, and the distance between—excuse me. May I start again?

The distance between the ends of legs 25a and the pivot point 17 is somewhat less than the vertical distance from [69] the pivot to the ground so that when the derrick is erected the legs can swing into position, as will be further described.

I quoted that from the patent, Exhibit 1.

Q. Can you identify the place in the patent where that quotation appears?

A. Yes, that appears in the patent in Figure 1 and in Figure 3.

Q. Will you state what the purpose of the extensions 41 are, that is, at the bottom of Figures 3 and 4, at the bottom of the legs of the derrick?

A. Yes. We did two things with those extensions. When the derrick was in the vertical position, and again reading from the patent, Exhibit 1, the legs 41 are screwed down until they rest in position upon blocks 42, which are suitably provided.

The other thing that we did with those extensions was that we made them rather long and telescoped them back sufficiently to give us a three-foot legal overhang in California.

Q. Looking at Exhibit 1—

The Court: That is to the sides?

The Witness: Yes, fore and aft. We telescoped them back toward the cab so that we had no more than a three-foot overhang in California. [70]

The Court: You aren't referring to the overhang

(Testimony of Cleon James Moon.)

over the side. You are referring to the overhang at the end.

The Witness: The forward overhang. We were permitted only three feet in front of the vehicle. Consequently, since those legs do reach the ground, or nearly reach the ground, it was necessary to make those extensions a little more—that is, we had to screw them in more, slide them in more. We actually made them so they both screwed and slid, so that they did not extend over the vehicle more than three feet.

The Court: That would not apply, according to your understanding, to the rear end?

The Witness: No, that would not apply to the rear end.

Q. (By Mr. Subkow): That device, was that employed in all your structures?

A. No, it was not. We did employ this screw mechanism for ground assembly in taking the load of the mast in all the structures.

On the other hand, after we got into the design of this unit it appeared that we might have to shift the weight a little bit, and on the first two units we made a track on top of the cab and in the derrick so that the derrick could be slid back and forth and comply with the three-foot legal overhang and meet certain legal weight requirements.

Mr. Subkow: Your Honor, that was an aspect I was going to take up a little later. I just wanted to clear up something [71] here. I would prefer to go

(Testimony of Cleon James Moon.)

back to continuing with the description of the structure.

The Court: Very well.

Mr. Subkow: And I will revert back to that again. And may I be permitted to go over this ground again at that time?

The Court: If you feel that it's advisable, yes.

Mr. Subkow: Thank you, your Honor.

Q. (By Mr. Subkow): Now, where is the hinge of the derrick positioned?

A. The hinge of the derrick is positioned on the derrick and on the cab above the driver's position, with the derrick legs spaced transversely apart with respect to the longitudinal axis, a distance greater than the driver's position; and with a portion of the cab extending into the leg position, with the legs straddling the cab.

Q. Now, will you illustrate where that is shown on the patent—the patent figures?

A. It is shown at 17 in Figure 1 and in Figure 3 and Figure 6, and again in Figure 11.

Q. Now, referring to Figure 3, I notice that two of the legs which appear at the back, and the front legs, are on the side of the cab, is that correct?

A. That is correct.

Q. Where is the front leg positioned with respect to [72] the cab?

A. It is forward, and also to the side of the cab on each side of the cab.

Q. Does it make any difference with regard to the functioning of the structure as to where the

(Testimony of Cleon James Moon.)

hinge is positioned with respect to any cross section taken through the cab?

A. No, except that supporting members have to also be positioned to carry the mast.

Q. What dictates the position of the hinge?

A. The ability of the driver to see the well head partly dictates it. The weight and balance of the unit partly dictates it. The erection of the mast partly dictates it. And the proximity of the well head partly dictates it. You can't have it too close to the well head, and you shouldn't have it too far away. There is a range of several feet in there where the distance would be immaterial.

Q. Does the inclination of the derrick, which you are willing to tolerate, affect the positioning of that hinge?

A. Yes, it does. Ordinarily we try to make these masts lean, oh, three to four degrees—certainly no more than five degrees—and the position of that hinge is determined then by the lean of the mast and the position of the well head. Because the position of the well head is also relative to the lean of the mast, since the mast has to be [73] centered over the well head.

The Court: In which direction is it supposed to lean?

The Witness: It leans forward toward the well head so that the block, the traveling block hangs over the well head when the mast is erected.

The Court: That block is a little off center?

The Witness: Yes. With respect to the center

(Testimony of Cleon James Moon.)

line of the mast, the block always hangs vertical, but the mast leans out of the way, so to speak. It's sort of like a large crane, except it has the features required for oil field work rather than for crane work.

Mr. Subkow: May I refer to Exhibit 14——

The Court: That's a photograph?

Mr. Subkow: That's a photograph.

The Court: A photograph of the Franks back-in unit erected.

Mr. Subkow: Yes, your Honor.

Have you a copy of it?

Hand that to the court.

The Court: No, no. I don't want yours. I want the clerk to keep track of these and hand them to me, because if the witness is using his copy, between the clerk and myself we will have the other copy.

Mr. Subkow: Yes. I thought he had it. I don't understand. [74]

The Clerk: I thought it already was borrowed, your Honor.

The Court: It was borrowed by whom?

The Clerk: By the court.

The Court: Well, I've given it back to you.

Mr. Subkow: According to my notes No. 14 is in evidence, your Honor.

The Court: The photograph. It was received this morning.

The Clerk: You promised to supply one.

Mr. Subkow: Well, for the time being, in order

(Testimony of Cleon James Moon.)

to save time, would your Honor accept the witness' copy?

The Court: No. The clerk will find the exhibit. Let's find it now.

We have so many copies there is no excuse for any counsel taking them off the clerk's desk. So, they either should be on this bench or on the clerk's desk.

Did you give it to the reporter?

The Clerk: I believe Mr. Subkow promised to give me a copy. I have the tag here but it's not attached.

The Court: Very well.

Well, perhaps you haven't furnished it.

The Witness: If I may interject, we started to use this this morning and it was withdrawn. Do you remember?

Mr. Subkow: I will accept all blame for the situation.

The Court: Well, do you wish the tag attached. The clerk has the tag but he doesn't have an exhibit to go with [75] it.

Mr. Subkow: Let us put a tag on this exhibit——

The Court: Very well.

Mr. Subkow: And if I find the glossy one somewhere, why, we can replace it.

The Court: Very well. Proceed.

Q. (By Mr. Subkow): Ignoring the fact that it's a back-in unit, in using this exhibit only to illustrate how the derrick when erected tilts and the

(Testimony of Cleon James Moon.)

relationship of the block to the derrick, will you continue your description?

A. Yes. As the derrick is tilted forward the block swings farther away from the derrick. That means that you do have more room to get a cab into the general area. Looking at Exhibit 1, again, and comparing it to the photograph, the more the derrick tilts and the farther out the block swings, then the more room you would have to place a cab—in the side view only. There are other things which enter into placing the cab, as far as the cross section is concerned. But in the side view you would have additional room.

Q. Now, referring to the particular construction of the structure shown in your patent, will you state the relationship of the hinge point with respect to the forward end of the chassis?

A. The hinge point is positioned at the forward end of the chassis. And in that case I would again like to [76] consult the specification, where I say,

“Two bearings 16 are positioned through the roof of the cab upon the member 15. The bearings 16 are each split and composed of two halves 21 and 22 hinged at 23 and bolted together with bolt 24. Pivotally mounted inside the bearings 16 is the tubular cross member 17 of the lower section 18 of the derrick 19.”

Q. Have you finished your answer?

A. Yes.

Q. Now, does the patent describe any structure for rotating the derrick to the erect position?

(Testimony of Cleon James Moon.)

A. Yes, it does. It describes a hydraulic ram 27. And reading from the patent in column 4, line 33,

“The jack 27 is then extended, the derrick rotating off its cradle on supports 20 and pivoting around the pivot 17 into vertical position, as shown in Figs. 3 and 4. When the derrick is in vertical position the legs 41 are screwed down until they rest in position upon blocks 42 suitably provided.” Continuing about the hydraulic jack, it states, “It will be observed that in moving into position from its rest position to its vertical position the thrust load imposed by 28 is exerted against bracket 26 and against the ground through jack 28’ while [77] the static load imposed upon the pivot 17 is transmitted through the column 14 to the cross members 13 and longitudinal member 11 and to the front axle. The load on 13 acts with the load on 26 to produce a bending moment in the longitudinal frame member 11 between these points, which bending load is transmitted to the axle and to the ground. Since the load on 26 is carried on the member 11 between the rear and front axles and its moment is added to the weight of the truck and is greater than the moment of the static load on 13, there is no tendency of the truck to tip and a stable platform for the drilling derrick is presented even without the aid of the jack 28’.”

Q. Mr. Moon, I am sure that we would all like to understand that statement. Will you state what that description means with regard to the stability of the truck?

(Testimony of Cleon James Moon.)

A. What it means is this: As we begin to erect the mast, we have a downward load in the cylinder 28 against pivot point 25, which is located between the front and rear wheels.

Q. That means the load is directed towards the ground?

A. The load is directed towards the ground, that is correct. [78]

The Court: On the hypotenuse of the triangle.

Mr. Subkow: Let us approach it in this way, your Honor:

Q. (By Mr. Subkow): When the load is first introduced into the cylinder 27 and the piston 28 starts to extend, it starts to lift the load of the derrick, does it not? A. That is correct.

Q. And, therefore, a counter-thrust is exerted through the 27 against the bracket 26, Figure 6?

A. Yes. Against the bracket 26 in Figure 6, through the pin 25 at the end.

Q. And that thrust is exerted against the chassis 11. A. That is correct.

Q. Now, remembering that the derrick extends forward as a lever arm like the balance arm of a scale, it bears down to the left of the pivot point 33 where the piston 28 is fulcrumed on the legs of the derrick, is that correct?

A. That is right. [79]

Q. What happens as a result of that at the pivot 17 of the hinge?

A. We have an up thrust, which places the frame in bending.

(Testimony of Cleon James Moon.)

Q. Now, do the relationship of the hinge supports 14 and 15 to the proximity of the end of the chassis have any effect upon the character of the bending which occurs in that frame, chassis frame 11?

A. Yes, they do.

Q. What effect does that have?

A. The closer the members 14 are to the bearing point 26, the less bending moment will occur in the frame.

Q. Now, as to the distance between the supports 14 and 15 and the bracket 26, which you call the bearing point, what is the relationship there as compared to that described in connection with Exhibit 12, the back-in unit?

A. The difference there is that with the back-in unit in Exhibit 12—

Q. That is the Woody patent?

A. Yes. We have a downward thrust at the start of the raising at the hinge point, and an upward thrust at the end of the frame. The downward thrust introduces—well, the two combined together form a couple, one going down and the other going up, which introduces bending into the frame of considerable magnitude. It lifts the support jacks, screw [80] jacks off the ground.

Q. Do you get any such bending in the structure of the patent 2,671,537?

A. Not of that type. The force of the jack 27 is sufficient to apply a downward load at the wheels 8 and the wheels 9, and, additionally, if the jack 28-prime is down at the jack 28-prime—well, that then

(Testimony of Cleon James Moon.)

provides a sufficient amount of downward thrust to keep the frame stable, even though there is an up thrust at 17. In other words, the member 14 is in tension, but the frame ahead of 26, while it is in bending, is rigid enough to make the design stable on its wheels.

Q. Now, as the derrick is rotated towards its erect position, what happens to the center of gravity of the mast?

A. The center of gravity moves forward as the mast is raised. At one point it will be directly over the pivot point 25 at the bearing 26 in Figure 1 and Figure 6, and from there on it will be applying a downward load on the hinge 17, and into members 14.

Also, from there on the weight of the mast, which is considerably less than the weight of all the other components, such as the engine, hoist drums and frame, the weight of the mast will apply downward load, which is counterbalanced by the weight of the other components through the frame 11. [81]

Q. In what direction is the thrust load in 27 against the bracket 26 at that point?

A. The thrust load is still down until the mast passes over center, at which time then the mast, or, the piston begins to work as a double-acting piston.

Q. Well, now, approaching that point before center, do I understand that the thrust load is down at bracket 26 and down through the members 14 against 11 on both sides at both points?

A. There is a range in there where it can be, yes.

(Testimony of Cleon James Moon.)

Q. And when it passes over center, the other phenomenon occurs as you have described?

A. Yes.

The Court: Do you ever use a jack on that front end of the frame, in front of the front wheels?

The Witness: Yes, we have, that is right.

The Court: It would take a great deal of weight off of those tires, wouldn't it?

The Witness: Yes. In certain designs that we produced we have put a jack directly under the front end of the cab. Of course, in actual production we used a bumper which was of a substantial nature, and we did have jacks under the bumper.

Mr. Subkow: We propose to introduce evidence on that point, your Honor. [82]

It is obvious, your Honor, but for purposes of the record may I ask him to state the position of the load transmitting connection between the chassis 11 and the rotating means 27 with respect to the wheels of the vehicle?

The Witness: Would you repeat that question, please?

Mr. Subkow: Will you read the question to the witness?

(The question was read.)

The Witness: The position is between the front and rear wheels of the vehicle.

Q. (By Mr. Subkow): Now, having erected the derrick, will you locate the derrick legs with respect to the transverse extent of the driver's position?

A. Yes. The legs—the continuation of the legs

(Testimony of Cleon James Moon.)

34—perhaps I had better read that from the specification.

Mr. Subkow: Your Honor, I withdraw that question. I believe that has been answered previously.

The Witness: I have answered it previously.

Q. (By Mr. Subkow): Now, referring to the structure in its erect position, will you state the portion of the structure which carries the load to the ground?

Mr. Subkow: May I ask the witness whether he would like a drink of water, your Honor?

The Witness: Yes, I would.

Mr. Subkow: I don't want to imply that this is a dry subject, your Honor. [83]

The Court: No, no.

Mr. Subkow: Would you like the question repeated, Mr. Moon?

The Witness: It wasn't finished, I believe.

Mr. Subkow: I am sorry. May I have the reporter read it?

The Court: Yes.

(The question was read.)

Mr. Subkow: I am surprised to hear that. Does the witness understand my question?

The Witness: I am afraid I didn't understand.

Mr. Subkow: Then I will repeat it in other language.

The Witness: But the portions of the structure that carry the weight to the ground are the front and rear legs through the extensions 25a.

(Testimony of Cleon James Moon.)

Q. (By Mr. Subkow): Is that the only portion of the structure which transmits the load which is imposed upon the legs?

A. Under certain conditions the load could be carried to the ground through 14, and to adjacent members which are not numbered, and the chassis frame into the jack 28-prime, or through the wheels if that jack wasn't down.

Q. Will you identify verbally the structures which you say are unnumbered, and the figure in which they appear?

A. They appear in Figure 6. One member is a vertical [84] upright member rearward and parallel to member 14. The other is an angular member attaching to 26, and the member previously mentioned.

Q. They meet at the apex, then?

A. They meet at the apex. Another is a horizontal member tying into the apex of those two members.

Q. Does such a structure appear on both sides of the vehicle? A. Yes.

Q. Now, you stated that under some conditions the load on the legs is transferred to these members and to the chassis, and through the jack to the ground. Will you state the conditions under which that occurs?

A. There are several conditions. One of the conditions is the applied load to the crown.

Referring to Figure 1, it will be noted that the hoist drum 7 is located behind the cab and behind

(Testimony of Cleon James Moon.)

the erection mechanism. The line from the hoist drum goes over the crown and to the traveling block at an angle. This can be seen in a back-in type in the photograph shown on Exhibit 14.

Mr. Subkow: Has your Honor that exhibit before you?

The Clerk: What number is that?

Mr. Subkow: Exhibit 14.

The Court: I have it in mind.

Mr. Subkow: All right. I appreciate that. I am [85] visually minded, and unless I have a picture before me, I have difficulty.

The Witness: Now, since there is a load applied in that line when the tubing load is picked up, and since that line is at an angle, two forces are involved; one vertical force, which is up, and one horizontal force, which is forward. Since it is forward, it imparts a load to the vehicle frame, which is applied eventually against the diagonal member previously discussed, which base is at 26 in Figure 6 of Exhibit 1, and goes through the structure to the hinge point, where it is resisted by the derrick.

The derrick also tilts over, and it has a downward force and a rearward force, which has to be resisted by that joint.

Q. What is the number of the joint?

A. The joint at the hinge point 17, so that the forces coming in from the drum go through the diagonal and vertical members in such a manner as to put load at 17, which is resisted by the reaction from the derrick.

(Testimony of Cleon James Moon.)

Q. Then do the members, that is, the diagonal member which attaches to the bracket 26 and the vertical member which meets it at its apex and is attached to the chassis, and the cross member therefrom to the verticals 14 and 15, cooperate with the legs to carry the load to the ground?

A. Yes, they do.

Q. How many of such cooperating members are there? [86]

A. In this design there would be six. There are three on each side.

Q. Three on each side of what?

A. Of the cab, or of the driver's position, which happens to be synonymous.

Q. Synonymous with what?

A. With the cab. The driver's position and the cab in this design could be treated as the same thing.

Q. Does the driver's position occupy the entire cab?

A. Yes, it does, from the front of the cab to the rear of the cab.

Q. How about transversely?

A. Not transversely. The driver's position is located between the supporting members, which have been previously described. The supporting members are spaced transversely apart with respect to the driver's position. [87]

Mr. Subkow: Your Honor, may we have a moment of appraisal here?

The Court: Yes.

(Testimony of Cleon James Moon.)

Q. (By Mr. Subkow): Now, I believe we haven't mentioned how this derrick moves about and gets all this power to do all this job.

Where is the power unit?

A. The power unit is an internal combustion engine, in most designs, which is located at the rear of the vehicle.

The Court: Is that the same engine which propels the vehicle itself?

The Witness: Yes. We make the same engine do all the jobs that the unit has to do. The engine is identified as 4 in the Figure 1 of Exhibit 1, and again as 4 in Figure 6 and Figure 7. We locate the engine in that position, and drive forward through a transmission system, a transfer case, right-angle gear box, to drive the hoist—the transfer case being used to drive the vehicle over the road.

The engine drives the drums, the hoist drums, through the right-angle gear box when hoisting operations are in progress.

Q. (By Mr. Subkow): Now, Mr. Moon, after you formulated and made your invention on December 12, 1946, what did you do about it?

A. We found a manufacturing firm interested in manufacturing [88] the design and putting it on the market. So, early in 1947 we made an arrangement with them, by agreement, permitting them to manufacture, under license, the design.

We hoped at that time to cover by patents a number of the features of this type of design. And we immediately started work running through the ac-

(Testimony of Cleon James Moon.)

tual shop design of the first of these units. For reasons of economy we decided to make the first one rather small—large enough to handle, oh, 3500 foot production. We decided to make it a 65 telescoping mast with a 160 horsepower internal combustion engine.

The Court: Well, what does the depth of the well have to do with the size of the mast? The length of the casing sections or——

The Witness: No. The casing comes in standard sizes.

The Court: That's my understanding.

The Witness: But you pull the tubing either in singles or doubles.

Now, if you pull it in doubles you have to have a mast of nearly 90 feet in height to get enough room to get the blocks in there and——

The Court: It's a time and labor factor.

The Witness: Yes, that's right. Additionally, as the well gets deeper, the weight gets greater because you have to [89] lift that much more pipe.

So, we started out with a mast that was 65 foot in height, and which would handle singles and which had a 90,000 pound hook load capacity, which was great enough to handle wells up to 3500 feet.

That also has an effect upon the horsepower that you select because you have to have sufficient horsepower to pull the well at a reasonable rate.

Now, the first thing we had to do was to lay out that particular unit and run a load and stress analysis upon the various members that were involved,

(Testimony of Cleon James Moon.)

the various items that were involved, the derrick, the drums and all the—the chassis and running gear—all the parts that were subject to stress.

Q. (By Mr. Subkow): Mr. Moon, when you started this design you joined the Waldrip Engineering Company as a vice-president of the company in charge of this project, did you not?

A. Yes, that's right.

Q. Did you still retain your office as president of the Western Oil Tool & Engineering Co., Inc.?

A. Yes, I did.

Q. When you made that design, what knowledge did you have as to that this design actually will produce a legal unit and would be useful for the purposes for which it was [90] intended?

Mr. Kenway: I am sorry. I couldn't hear that question. May I have it?

The Court: Please read it, Mr. Reporter.

Mr. Subkow: I would be grateful if it was called to my attention—I have a tendency to drop my voice. Or, I shout too much. So——

The Court: Well, there's an amplifier back there on the lectern.

Mr. Subkow: I will return there for a while, if it will help at all.

The Court: No. I think we can all hear you.

Mr. Kenway: This is the only question that I couldn't hear.

The Court: Please read it, Mr. Reporter.

(Question read.)

The Witness: As the design progressed we ran

(Testimony of Cleon James Moon.)

weight estimates upon all the items that were going into the machine. And we arranged these in such a fashion that they would be functionally adequate and, at the same time, properly load the wheels. As the design progressed, we found that in some instances we were getting a little too heavy on the front wheels or the rear wheels, so that we would shuffle them back and forth.

This design took over a year to finish, and, actually, [91] at that time I think I had between six and eight men working on it.

It appeared early in the design that we might have some troubles with being overloaded on the front wheels. Also, we had the problem of forward overhang staring us in the face, but we thought we had that solved by just making the extensions of the legs longer.

Q. I will accept the answer, but it was not quite responsive to my question. My question was, at the time that you made the invention in December 12, 1946, what assurance did you have, what knowledge did you have that the design that you had then laid out would produce a legal unit and be useful for the purposes for which it was intended?

A. Well, we couldn't be sure that that design would meet the legal weight requirements.

Q. Do I understand that you had to go through these other design features and analyses in order to determine that point? A. That is correct.

Q. You referred in your previous answer to the

(Testimony of Cleon James Moon.)

fact that you came to a point where you were going to make some change in your specific design.

A. That's right. [92]

Mr. Subkow: I hand you a large drawing, which is Exhibit No. 23——

Your Honor, this is one drawing we did not reduce. It's so large—may I have some help from someone in holding it?

I think we can all see. May we come close to your Honor?

The Court: Yes.

Mr. Subkow: Can you see it from here?

The Court: Yes, I can see it.

Mr. Subkow: Now, if you will explain—well, I think I need my whole team. Max, if you will hold the other side and, Ed, if you will be the pointer. As the witness explains it, you point to the features.

The Witness: Well, would it be all right if I stepped down?

The Court: Yes.

The Witness: Thank you, your Honor.

Mr. Subkow: Here's a pointer, Mr. Moon.

Well, may we move the big easel over here, and then we will all avoid this dramatic spectacle. I think we can staple it on here without disturbing anything.

The Court: Or, you can put it over it.

Mr. Subkow: Yes. Let's move it over here.

The Court: Do you offer Exhibit No. 23 in evidence?

Mr. Subkow: I was going to identify it. It has

(Testimony of Cleon James Moon.)

no date, [93] your Honor, and perhaps we ought to have some identification by the witness before we offer it.

The Court: Has Exhibit No. 22 been received in evidence?

Mr. Subkow: No, sir. We have not yet reached that point, your Honor.

The Court: Very well.

Mr. Subkow: Would you get out, for the court's benefit, Exhibits 27, 28 and 29?

(Whereupon exhibits were handed to counsel.)

Mr. Subkow: I think explanation will be more lucid by reference to these photographs, which are photographs of the units which are shown on there. And I think the whole story will be more graphic.

The Court: Well, I think we might as well take the recess until tomorrow morning.

We will take the recess until tomorrow morning at 9:30, if there is no objection.

Trial will be recessed until tomorrow morning at 9:30.

(Whereupon at 4:30 o'clock p.m., an adjournment was taken until 9:30 o'clock a.m., Wednesday, March 26, 1958.) [94]

Wednesday, March 26, 1958, 9:30 a.m.

The Court: Are there any ex parte matters?

The Clerk: No ex parte matters.

The Court: You may proceed with the cause on trial.

Mr. Subkow: Your Honor, preliminarily I wish to make a motion for the correction of the transcript of the record. The record is very clean, but there are a few places——

The Court: Can't you gentlemen stipulate on them? Why don't you try to do that at some recess? Are there a number of them?

Mr. Subkow: Oh, no. There are only five places, I believe, and that is all.

The Court: Have you discussed it with counsel?

Mr. Subkow: No. They just arrived.

The Court: Then suppose you do that and save time.

Mr. Subkow: All right. Before I go on, your Honor, I understand that in the present proceedings we are trying the issue of validity only, and that we are not to put in testimony with respect to infringement.

The Court: If that is practicable. Of course, if you have a witness on the stand and you don't want to call him back, perhaps later, we will take all of his testimony, but I would not think you would need to go into any of that with Mr. Moon. He will be here in any event, I take it? [98]

Mr. Subkow: Yes.

The Court: But as to any other witness, where it would be inconvenient for him to return, say, on Thursday or Friday, it will be all right for you to complete your evidence.

Mr. Subkow: I will raise this point a little later this morning, when I come to another aspect of the

proceedings, as to the order of proof, but at the present time we will go on with Mr. Moon.

The reason I ask your Honor is that in connection with the issue of infringement, I was going to discuss, or, rather, I was going to have the witnesses discuss, your Honor, the forces that occur in the structure, and I was going to apply them to the defendants' structure, and show the similarity.

However, if we are going to try the issue of validity, I would like to have that before your Honor, and, therefore, wish to use as demonstrative evidence a chart we have prepared, applied to the defendants' structure, which we could use in this connection to further explain the forces.

I have discussed it with opposing counsel, and I think that the limitation of proof could result.

The Court: When a witness is on the stand, I would exhaust him if it is practicable to do so.

Mr. Subkow: Subject to your indulgence to recall him if I should have forgotten something.

The Court: Yes. [99]

Mr. Subkow: Thank you, sir.

Then may Mr. Moon take the stand?

CLEON JAMES MOON

the witness on the stand at the time of the adjournment, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Subkow): At the termination of the proceedings last night we were discussing Ex-

(Testimony of Cleon James Moon.)

hibit 23. Before taking up Exhibit 23, I should like to revert to another matter. During the period of your design, did you prepare any documents in the nature of a brochure for your organization?

A. Yes, we did.

Mr. Subkow: May I have your Honor's permission to withdraw from the Moon deposition Exhibit 8?

The Court: You may. Exhibit 8 to that deposition?

Mr. Subkow: 8 of that deposition. [100]

The Court: Very well.

Mr. Subkow: It will be numbered Exhibit No. 22.

The Court: Very well. The clerk will withdraw Exhibit 8 from the Moon deposition and number it Exhibit No. 22 for identification here. The Waldrip brochure?

Mr. Subkow: Yes, sir.

Mr. Lyon: That is listed and has been marked by the clerk as Defendants' Exhibit H, and will be so offered by the defendants, unless Mr. Subkow is going to anticipate——

Mr. Subkow: Oh, I don't care how it gets in.

The Court: Well, do you wish to offer it now as Exhibit H?

Mr. Kenway: Yes, your Honor.

The Court: Is it stipulated to be genuine and in all respects what it purports to be?

Mr. Lyon: There is a stipulation covering it.

The Court: Any objection to the offer?

(Testimony of Cleon James Moon.)

Mr. Subkow: Not at all.

The Court: We will receive Defendants' Exhibit H. And I assume you can use it in that posture.

Mr. Subkow: Yes, your Honor.

(The exhibit referred to, marked Defendants' Exhibit H, was received in evidence.)

Mr. Subkow: Will you hand it to his Honor?

(Whereupon the exhibit was handed to the court.) [101]

Mr. Subkow: Oh, your Honor, we supplied it also to the clerk as our Exhibit No. 22. May we withdraw it so we can use it?

The Court: Yes. Exhibit No. 22 for identification may be withdrawn.

(The exhibit previously marked Plaintiffs' Exhibit 22 for identification was withdrawn.)

Q. (By Mr. Subkow): Will you state what this document is, Mr. Moon?

A. That is a collection of drawings and specifications prepared for use in the Waldrip organization showing our various managing personnel the types of units we propose to design and build.

Q. Were these people under any injunction to keep this matter confidential?

A. It was information that was supposed to be held confidential within the company. If any portion of it was shown to a prospective customer, it was shown as a confidential matter.

Q. I notice that the first section is marked 321.

Mr. Subkow: Your Honor, we only have one

(Testimony of Cleon James Moon.)

copy. May I stand next to the witness so I can see it, too?

The Court: Yes, if you wish.

Q. (By Mr. Subkow): What does index 321 designate?

A. The 300 series, which is indicated by the 3, [102] indicated a certain size of machine. The 2 and the 1 indicate that it was a self-propelled model, a drive-in type.

We had proposed to use other numbers for skid types and conventional truck-mounted types if we ever built them.

Q. Then 321 represents one size of the drive-in unit, and 421 represents what?

A. It represents a second size of the drive-in unit, with a slight increase in size.

Q. 521?

A. That is an increase in size, also. And it is a drive-in unit.

Q. 622?

A. 622 was a trailer-mounted unit of the larger size. Here you will note that the last two numbers are 22 rather than 21. We used the number 22 to indicate trailer-mounted models.

Q. Now, were any units of these units built?

A. Yes.

Q. Of this series? Which ones?

A. The 321 was built, two models of it. The 421 was built with two separate sizes of mast. And the 622 was built.

Q. Was the 622 a drive-in unit?

(Testimony of Cleon James Moon.)

A. The 622 was a semi-trailer unit and was not a drive-in unit.

Q. What kind of a unit was it? [103]

A. Semi-trailer unit powered by a separate hoist engine and transported by a separate truck tractor, which pulled the unit over the road and backed the unit into location. It is a back-in unit.

Mr. Subkow: If your Honor will turn to the back of the section, you will find a drawing of this kind. The pages are unnumbered.

The Court: What section is that under, now?

Mr. Subkow: That would be under the 622 section.

The Court: 622. I have it. The end of it here.

Mr. Subkow: Yes.

The Court: Very well.

Q. (By Mr. Subkow): Does this drawing illustrate the structure you were referring to?

A. Yes, it does.

Q. I am now turning to a drawing under the 622 section, and I believe it's the only drawing, if I am correct, of such a unit. Is that correct?

A. Yes, that is correct.

Q. Now, at the end of the session yesterday you were starting to describe the structure shown in Exhibit 23, and which we have mounted on the board.

Mr. Subkow: Your Honor, I don't know. This is sort of far away. I don't know whether you will be able to see it. May we bring it closer to you?

The Court: Yes. I can see those lines.

(Testimony of Cleon James Moon.)

Mr. Subkow: Can you? Can you see these features back here (indicating)?

The Court: Well, not in great detail.

Mr. Subkow: Well, the detail may be of some significance. We may ask your Honor to step down if it is not contumacious to suggest it.

The Court: Oh, no. I want to learn.

Mr. Subkow: I hand the witness a crayon and I ask him to mark portions of the structure.

Q. (By Mr. Subkow): Now, will you describe what you did and the purpose for which you designed this feature into your drive-in?

Mr. Kenway: If your Honor please, it doesn't appear from the record just what this was supposed to be. Does it represent something that was supposed to have been built in accordance with the patent? Or if not is this a preliminary leading up to what is shown in the patent.

I think it would be helpful——

Mr. Subkow: Perhaps the witness' testimony will clear that up.

The Court: Very well.

Q. (By Mr. Subkow): Go ahead, Mr. Moon.

A. When we started——

Mr. Subkow: May I stand closer, your Honor?

The Court: Yes.

When was this made, Mr. Moon?

The Witness: This drawing was made—there is no date. I will have to——

The Court: Does it represent some device that is current now, or some earlier stage?

(Testimony of Cleon James Moon.)

The Witness: It represents a stage in the development of our drive-in. As I recall, this drawing——

The Court: Before 1947?

The Witness: I believe it was probably in February of 1947.

The Court: Very well. You may proceed.

The Witness: When we started the layout of the drive-in, the 321 drive-in, we originally were faced with a problem of making the wheel loading at the front and rear wheels comply with highway regulations. We had determined that not only this unit but all of our drive-in units would comply with highway regulations.

We had two problems: the problem of getting all of the weight, the mast, the drums, the engine, the transmission, raising system, the extras such as the air compressor, tankage and air compressor, located along this frame in such a manner as to provide legal wheel loading. Additionally, we had one other problem, and that was to keep the distance here within three feet of the front bumper.

Now, as our design continued, our preliminary design continued in the early months of this development, and our first layouts were made, it appeared that we might have a little difficulty keeping the front wheel loading legal. Also, it appeared that we might have some tire difficulty, because we actually exceeded the tire manufacturer's loading a modest amount, and it appeared that we might

(Testimony of Cleon James Moon.)

exceed them considerably more. Only road tests would prove where we stood.

However, to prevent being illegal, we decided to slide the mast back and forth on this chassis, and in such a manner that when we went over the road the mast would be slid to the rear in such a way as to provide legal wheel loadings and practical wheel loadings. [107]

When we arrived at the location, we slid the mast forward on a track. We didn't have it here (indicating). We slid it forward to a fulcrum point, and fulcrumed it off of the front end of the cab.

That brought this point up to here (indicating), and enabled us to erect the mast so that when the legs rotated about the point back here, they nearly reached the ground. After they nearly reached the ground, we extended them so that they did reach the ground by means of a screw, the screw in the jack right here (indicating), which is not shown.

Now, after we got into the design further on, actually——

Mr. Subkow: Just a moment. I think that that would be clearer perhaps if we offered at this time Exhibits 28 and 29. These exhibits have been, I believe, in the affidavits. Does our exhibit list show that they have been previously——

The Court: Is there any objection to the offer?

Mr. Subkow: I believe they have been.

The Court: Any objection to the offer of the two photographs?

(Testimony of Cleon James Moon.)

Mr. Subkow: While the list does not show them, I believe they were in the Moon affidavit.

The Court: Any objection?

Mr. Lyon: No objection.

Mr. Kenway: No. [108]

The Court: Exhibits 28 and 29 are now received in evidence.

(The photographs referred to was marked Plaintiffs' Exhibits 28 and 29 and received in evidence.)

Q. (By Mr. Subkow): When using these exhibits, please in discussing them refer to the exhibit number. Will you continue with your explanation?

A. Exhibit 28 shows the mast slid to the forward position prior to erection.

Now, we had a track built in to the lower section of the mast, which is not shown in the photograph, and I will mark it 1.

Would your Honor like to see?

The Court: What exhibit is this?

The Witness: This would be Exhibit 28.

The Court: 28?

The Witness: Yes.

The Court: That appears clearly on Exhibit 29 also, does it not?

The Witness: Yes, it does, and if you would like, I will mark it there also with the figure 1.

There was one of these tracks on each side of the rear mast leg. Located at the front end of the vehicle was a fulcrum bar with a square block. That is at the top of the cab, and immediately below

(Testimony of Cleon James Moon.)

that bar is a latch. The latch is secured to the vehicle. When that latch is pulled down, it permits the derrick to be retracted rearwardly, so that it is positioned back. We accomplish that by extending a hydraulic cylinder. When we wanted to return it to its front position prior to erection, we pulled it with a line around the traveling block. We anchored the traveling block at the mast, came around the crown, and back around over the top of the guard structure of the hoist, around the guide, and down to the drum. We did that in such a manner that the force applied to the block system, when it was locked, would force the mast over on the track. We built two of those.

Mr. Subkow: Will the clerk please hand to your Honor Exhibits 24, 25 and 26?

(Thereupon the documents referred to were handed to the court.)

Mr. Subkow: May we have a stipulation that these are authentic records made in the ordinary course of business, and they will be admitted under the business book rule?

Mr. Kenway: I have no objection as to their genuineness, but I question their materiality.

Q. (By Mr. Subkow): I hand you Exhibit 24, and ask you in a general way to state what this exhibit shows.

A. This is an engineering release record of the 321-1. That would be the first 321 built, showing the dates [110] that shop drawings were released

(Testimony of Cleon James Moon.)

to the Waldrip Production Department, who, in turn, released them to the shop for manufacture.

Q. I notice that the first one is entitled "Main Drum," and has a release date of 12-18-47, and that these releases continue under the release date, and I also see some designations saying "Done," and other indications under the column of "Engineering." Will you state what that means?

You may resume the stand, Mr. Moon.

A. That is——

Q. You have your own exhibits there, I believe, 24, 25 and 26.

A. Referring now to Exhibit 24 previously described, the release dates in some instances do show that the engineering had been finished, and in the second column under "Release" had been released to the shop.

Q. I notice at the right-hand top of each page is a date. The first page is 2-19-48, and the third page 3-16-48. Will you indicate what that date represents?

A. That was the date that these sheets were prepared. These sheets were prepared at regular intervals to show the progress that was being made in engineering and in manufacturing when we were building the first two units.

Q. I call your attention to the last page preceding [111] the photographs, and I read, "In view of above facts I feel doubtful that the unit can be sent to the yard Saturday as planned." The Sat-

(Testimony of Cleon James Moon.)

urday refers to what date? I call your attention to the third preceding page.

A. This memorandum is dated March 25, 1948.

Q. Can you state the circumstances of that statement?

A. Yes. It was directed to the plant manager, Mr. Summerstrom, from one of my engineers who was acting as my assistant and later was the chief engineer, C. A. Forsberg. It was an explanation concerning the state of manufacture and of engineering of the first 321.

Q. I notice what may or may not be your initials below the "C.A.F." Are they or are they not?

A. No, that is Cliff Summerstrom's initials.

Q. I see. My print is very unclear. Now, turning to Exhibit 25, will you tell us what that exhibit indicates?

A. Referring now to Exhibit 25, that is the same type of engineering release information on the second 321, and it is dated March 19, 1948.

Q. Was it completed before or after the 321-1?

A. They were progressing through the shop at almost the same time. Perhaps the second one was as much as a week later, at this particular period of manufacture.

Q. I call your attention to the 421-1, Exhibit 26. [112] Will you state what that exhibit indicates?

A. Exhibit 26 is the same type of release, applied to the first 421 which we were building, and which very closely followed the first and second 321 models.

(Testimony of Cleon James Moon.)

Q. The dates given in the upper right-hand corner of the pages of both Exhibits 25 and 26 indicate what?

A. That these sheets were prepared and shown to managing personnel on March the 19th, 1948.

Q. Now, was Model 421, or, did Model 421-1 contain this sliding feature of the derrick?

A. It did at the beginning. However, in our road testing of the first 321, we discovered that the wheel weights at the front were not as bad as we thought they would be. [113]

Mr. Subkow: Will you pick out Exhibits 36, 37, 38 and 39 and give them to his Honor?

(Whereupon the documents were given to the court.)

Mr. Subkow: May we have the same stipulation with regard to the authenticity of these documents, that they were prepared in the ordinary course of business on the dates indicated on the very sheets, and constitute evidence admissible under the rule?

The Court: Any objection as to the offer of Exhibit Nos. 24, 25, 26?

Mr. Kenway: He dropped his voice at the end, your Honor. I couldn't hear what he said.

Mr. Subkow: We are talking now about Exhibits 36, 37, 38 and 39.

The Court: Are you offering Exhibits Nos. 24, 25 and 26?

Mr. Subkow: I thought they went in. I am sorry. Certainly I offer them. I thought there was a stipulation.

The Court: Any objection?

(Testimony of Cleon James Moon.)

Mr. Kenway: I object to them as not being material. And there was no offer, as I understand it.

The Court: Is there any objection to foundation?

Mr. Kenway: No, sir, just on materiality. I don't question the genuineness.

The Court: Well, they were offered as business records under the business record statute, and if there is no objection [114] they will be received—if there is no objection on that ground they will be received. The objection as to immateriality will be overruled.

Exhibit Nos. 24, 25 and 26 for identification are now in evidence.

(The exhibits referred to, marked Plaintiffs' Exhibits 24, 25 and 26, were received in evidence.)

The Court: Now, with respect to Exhibit Nos. 36, 37, 38 and 39—

Mr. Subkow: Yes, sir.

The Court: —are they in the same category?

Mr. Subkow: I am offering them in the same category.

The Court: Any objection for lack of foundation?

Mr. Kenway: No, your Honor.

The Court: They may be received in evidence.

(The exhibits referred to, marked Plaintiffs' Exhibits 36, 37, 38 and 39, were received in evidence.)

Q. (By Mr. Subkow): Will you state what each of these exhibits are, stating them each separately?

(Testimony of Cleon James Moon.)

A. Referring to Exhibit No. 36, this is a progressive weight analysis of the second 321, which is dated March 22, 1948.

Q. And will you state what that record shows?

A. Yes. As we proceeded with the manufacture, we weighed or made very close weight estimates concerning the weight of the individual components. Then we calculated the effect that the placement of those items would have upon the wheel loads. That is shown as the moment in inch pounds in the right-hand column.

Q. Of what page?

A. Of page 1 of the 321-2 weight analysis, Exhibit No. 36.

Q. Does this exhibit show any further analysis of the effect of those weights upon the axles of the structure?

A. Yes, it does. I believe that on the last page—that would be page 4—it shows the loads on the rear wheels and the loads on the front wheels.

Q. Will you state what those loads are?

A. The total calculated on the rear was 30,717 pounds—

Q. On what page is that now?

A. On page 4 of Exhibit No. 36.—and 11,986 pounds total front load on the front wheels, with a gross total of 42,703 pounds.

Q. What does that indicate with regard to its conformance with the load requirements of the California statute as to which you testified yesterday?

(Testimony of Cleon James Moon.)

A. It indicates that it is within the legal limits of the California Highway Code. [116]

Q. As far as you know would it be in the legal limits of other states?

A. I cannot answer that question without reference to some of the codes. I do not know.

Mr. Subkow: It is an unfair question, I think.

Q. (By Mr. Subkow): Exhibit No. 37, can you state what that exhibit is and shows?

A. Exhibit No. 37 is a similar exhibit applicable to the first 421 drive-in unit. The same information is presented here as was presented for the 321-2. And on page——

Q. The fourth page, Mr. Moon?

A. ——4 of Exhibit 37 is shown a weight analysis that shows 30,917 pounds on the rear axles and 13,077 pounds on the front axles, for a gross total of 43,994.

Q. Turning to Exhibit 38, and to the last page of that exhibit, I notice an initial at the lower right-hand column, "J.M." Is that your initial?

A. Yes, it is.

Q. When was it placed upon the record?

A. Shortly after I received the record on March 29, 1948.

Q. Did you receive the record on the preceding four pages? A. Yes, I did.

Q. Is the "J. Moon" appearing at the top of the first [117] page you? A. Yes.

Q. And you received it when?

A. I received that page on the date that it was written, April 1, 1948.

(Testimony of Cleon James Moon.)

Q. You said "that page." Did you receive also the following three pages?

A. No. I believe the following three pages—yes. The following three pages were received at the same time. They are all part of the same memo.

Q. How about the fourth page?

A. The fourth page was prepared by me on March 3, 1948 and had been delivered to Mr. Denis, who had superseded Mr. Summerstrum as plant manager.

Q. Will you state the circumstances of the preparation of these documents?

A. Well, as can be seen from Exhibit 37, page 4, we had a total rear weight on the first 421 of 30,917 pounds. At that time we were allowed—

Q. I beg your pardon. You were referring to Exhibit No. 37?

A. Exhibit No. 37, page 4.

Q. Yes.

A. We had a total rear weight of 30,917 pounds. That meant we were overweight 117 pounds, because the California [118] Code at that time for the axle spacing which we used permitted us 30,800 pounds.

Consequently, we decided to try out some weight-saving measures.

You will note that in the middle of page 5 of Exhibit 38, that the weights mentioned on page 4 of Exhibit 37 read:

"421-1—unchanged:

"Rear—30917—"

(Testimony of Cleon James Moon.)

Mr. Subkow: I am sorry. I have lost that. Will you repeat that statement?

Mr. Reporter, will you read the answer so far?

(Record read.)

Q. (By Mr. Subkow): You may continue.

The Witness: "Rear—30917.

"Front—13077.

"Note: This is over-legal on rear axles (the maximum allowable is 30,800 pounds).

"Present changes being started are:

"A. Shifting power unit assembly forward—12 inches.

"B. Moving rear axle assembly back—8 inches.

"The axle loadings then will be:

"Road position——"

That is with the mast slid rearward as I explained [119] previously.

"Rear: 29,917 pounds.

"Front: 14,077 pounds.

"Erecting position:

"Rear——"

That would be with the mast slid forward for erection,

"Rear: 27,217 pounds.

"Front: 16,737 pounds." "

Now, there is a comment there, "This overloads the front axles and tires. A cautionary note will be fastened to the dashboard of the vehicle to this effect. An over-all re-analysis will be made as time permits for gross weight reduction for our standard model starting with 421-2 unit."

(Testimony of Cleon James Moon.)

When we road-tested these units we found that while the tire loadings were beyond the manufacturer's recommendation—and that was what was referred to in “this overloads the front axle and tires”—it was not overloaded as far as the legal code was concerned, because we were allowed 18,000.

But we were afraid of the tire capacity. However, after extensive road testing of these vehicles we decided that we could tolerate that overload with considerable safety. We also discussed the matter with tire manufacturers and discovered that the actual burst pressure of the [120] tires was five times the rated capacity and that the only effect would be reduced tire life. They had no reservations concerning the safety of the tires at that loading. However, these vehicles in their entire life might accumulate less than 10,000 miles of travel, since they are moving relatively short distances, from well to well or field to field. Consequently, we accepted these wheel loadings and we even went further: we decided at that time, or shortly thereafter when we built the—when we finished the first 421-1, to eliminate the sliding track. We had had some difficulty with it in testing. And we wanted to change the first 421-1 before it was released to the customer.

Q. Before we go into that I just want to complete the presentation of this group of exhibits.

Now, will you refer to Exhibit No. 39, and will you state whether the “J. Moon” refers to you, and whether you placed your signature at the top of that?

(Testimony of Cleon James Moon.)

A. The "J. Moon." applies to me. However, I did not place that on there. That was placed on there so that I would see it. [121]

Q. Did you see it? A. Yes, I did.

Q. When did you see it?

A. At the time of the date on the sheet, or near the time. That would be April 29, 1948.

Q. Will you state what this exhibit shows?

A. Yes. That shows that our first 321, which at that time had been road tested and weighed, and was very close to being ready for delivery and first testing, had an actual scale weight of 31,050 pounds on the rear, and 15,220 pounds on the front wheels, with a gross of 46,270 pounds for the complete loaded unit.

Q. You are referring to Exhibit 39?

A. Exhibit 39.

Q. In what position was the derrick at that time?

A. The derrick was in this memo nine inches forward, and, frankly, I don't know what is meant by "nine inches forward." It may have been a position selected on the track to determine where, if we went to a fixed hinge point, we should place that hinge point to properly load the wheels.

Q. On the left-hand side I see a box in which there are loads: Rear, 26,900; front, 13,420; 40,320 unloaded. What does that represent?

A. That represents the difference between the loaded unit and the unloaded unit. The unloaded unit was the [122] weight empty, without sand

(Testimony of Cleon James Moon.)

line, and without fuel, and without the extras that commonly were applied at that time to the unit.

To the right-hand side it shows the same weights, front and rear and gross for the unit when it was loaded, with the items necessary and previously mentioned for use at the well head.

Q. Do I understand you to say these are actually weighed weights, and not theoretically calculated weights?

A. The top weight at the top of the page of Exhibit 39 is an actual scale weight.

Q. The gross, 46,270, is that the one you are referring to?

A. Yes, the gross 46,270. The rest of the weights I don't know. I judge from their appearance on these sheets they are actually calculated weights based upon knowledge at the time.

Q. Who is "B.P.B.," whose initials appear under it?

A. That is Benjamin P. Baylass, who was a vice-president in Western Oil Tool and Engineering Company at that time, and who was acting as an assistant to me upon this project.

Mr. Subkow: May I ask the clerk to present to the court Exhibits 30 and 31.

(The documents were handed to the court.)

Mr. Subkow: First, may I have a stipulation that—excuse me. I think the examination will bring out the feature, and then I will introduce them.

Q. Will you state what the photographs, Ex-

(Testimony of Cleon James Moon.)

Exhibits 30 and 31, show, identifying the exhibits in your answer.

A. Exhibit 30 is a photograph taken of the first Waldrup 321 drive-in during the final stages of manufacture.

Q. Can you identify the parts on that photograph, using again the crayon, and will you be so good as to mark the judge's copy as well?

Will you first mark the parts you are going to discuss, all of them, and then we will return the exhibits to his Honor, so that he will have them before him during your testimony.

(The witness does as requested.)

Q. Now, having done that also for opposing counsel, will you do that as well for me?

(The witness does as requested.)

Q. Have you handed to his Honor the marked exhibits? A. I have.

Q. Fine: Continue with your testimony, Mr. Moon.

A. Now, referring to Exhibit 30, this is a view taken looking rearward from the cab, with the photographer's back to the cab, and shows——

Q. Just a moment. When was it taken, Mr. Moon? [124]

A. I took this photograph some time during April of 1948.

Q. Continue.

A. I would like to correct that. It was taken some time during February of 1948.

Q. What makes you choose the date, Mr. Moon?

(Testimony of Cleon James Moon.)

A. This was taken about the time that we ran our first road tests, and that occurred some time during that month. We ran the first road test without the derrick on it, and without the sheathing on it, the guard, and I am sure that I took some photographs at that time of the unit.

Q. Continue, sir.

A. It shows, in the order of their occurrence rearward, the main or front hoist drum.

Q. What number is that?

A. Which is No. 1. It shows the right angle drive to the hoist from the engine, and that is 2. It shows the sand rail drum 3. It shows the torque converter and transmission assembly 4, and it shows the engine 5, and it shows the track rail for the rear derrick support for the sliding type of mast at 6.

Mr. Subkow: I offer Exhibit 30 in evidence.

Mr. Kenway: No objection.

The Court: Received in evidence.

(The exhibit heretofore marked Plaintiffs' Exhibit 30 was received in evidence.) [125]

Q. (By Mr. Subkow): Will you now state who took the photograph, Exhibit 31, and when?

A. I did, and it was taken on the same date that I took photograph 30—shown in Exhibit 30.

Q. What does the exhibit show?

A. Again reading rearward from the left, it shows the main drum——

Q. Is it of the same unit of which Exhibit 30 is a photograph?

(Testimony of Cleon James Moon.)

A. It is the same unit. It is the first 321 drive-in built by Waldrip.

Q. Go ahead.

A. Reading rearward from the left, it shows the main drum 1, the countershaft extending outwardly from the right angle gear box 2, the sand rail drum 3, the torque converter and transmission 4, the engine at the rear 5, and the track overhead to spot the mast when it is slid backwards and forwards 6.

Q. Referring to Exhibit 1, will you identify in Exhibit 1 the features which you have numbered 1, 3 and 5? That is the patent, Mr. Moon.

A. Yes, I understand. I have it here.

The Court: Identify them on one of the Figures in the drawings?

Mr. Subkow: Yes, referring to the figure upon which [126] you are making your identification.

The Witness: Now, referring to Exhibit 30 and Exhibit 31, compared to Exhibit 1, in Exhibits 30 and 31 the main drum 1 is the same as the main drum 7 in Figure 1 of Exhibit 1.

The Court: 7?

The Witness: Yes, 7. Referring again to Exhibits 30 and 31, the right angle gear box 2, which is shown in Figure 2 in the plan view and is unnumbered——

Q. (By Mr. Subkow): Where is it positioned?

A. Positioned between the front and rear drums.

The Court: Between 6 and 7?

The Witness: Between 6 and 7.

(Testimony of Cleon James Moon.)

The Court: Are the drums reversed in Figure 1 of the patent?

Mr. Subkow: Your Honor, the photographs are reversed to the drawing. The photographs show the engine to the right, whereas the patent shows it to the left.

The Court: Yes, I see. [127]

Q. (By Mr. Subkow): Go ahead, sir.

A. Again, referring to the comparison, item 3 of Exhibits 30 and 31, is item 6 of Exhibit 1 shown in Figure 1. Item 4 of Exhibit 30 and 31 is shown in Figure 1 of Exhibit 1 as dotted lines progressing frontward from the engine, and is the torque converter and transmission.

Q. Now, items that you have marked 2 and 4, were they invented by you, Mr. Moon?

A. No, they were not. They were common in the industry at that time. The Franks back-in units utilized a right angle gear box of similar design; and many manufacturers in the industry were familiar and used torque converter and transmission means to drive the hoist.

Mr. Subkow: I offer Exhibit 31 in evidence.

Mr. Kenway: No objection.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiffs' Exhibit 31, was received in evidence.)

Mr. Subkow: Mr. Moon, will you now turn to Exhibits 32, 33, 34 and 35.

The Court: Those are photographs?

(Testimony of Cleon James Moon.)

Mr. Subkow: Those are also photographs, your Honor.

The Clerk: I don't have them.

Mr. Subkow: Well, because they are parts of other records that you have. They are identified as 32, 33 and 34—those are Exhibits 5, 6 and 7 of the Moon affidavit. [128]

And may they be withdrawn from that affidavit for use here?

The Court: Yes, they may. The clerk will withdraw them and renumber them as filed exhibits for identification.

(The exhibits referred to were marked Plaintiffs' Exhibits 32, 33 and 34 for identification.)

Mr. Subkow: Now, the only one that we don't have is Exhibit No. 35, Mr. Clerk?

The Clerk: You do have No. 35 here.

Mr. Subkow: Then we have all four of them.

The Clerk: Yes.

(The exhibit referred to was marked Plaintiffs' Exhibit 35 for identification.)

The Court: May it be stipulated that these photographs fairly depict what they purport to depict?

Mr. Kenway: I have no objection.

The Court: Do you offer them in evidence?

Mr. Subkow: I offer them in evidence.

The Court: Exhibits 32, 33, 34 and 35 are received in evidence.

(The exhibits referred to, marked Plaintiffs' Exhibits 32, 33, 34 and 35, were received in evidence.)

(Testimony of Cleon James Moon.)

[See Exhibits 33, 34 and 35 in Book of Exhibits.]

Mr. Subkow: You are having some trouble finding them, Mr. Clerk? [129]

The Clerk: Yes.

Mr. Subkow: The affidavit is part of the record as part of the motion for summary judgment.

The Clerk: It is in that red folder, and they are all contained——

The Court: Well, take them out of mine.

Mr. Subkow: We can supply you another set.

The Court: If you gentlemen wish to make use of that red folder, you may do so.

Mr. Subkow: We have extra copies if you wish to use them, your Honor.

The Court: I made some study of those matters on the motion for summary judgment. I couldn't determine from the publications in the magazines whether they were the same device or not.

Mr. Subkow: That was our conclusion, your Honor. And that is a point that they were trying to make.

The Court: If I had the aid of some expert to point it out to me——

Mr. Subkow: We assume the situation may be different after this trial is completed. But we hope you will come to the same conclusion.

The Court: Very well.

We will take the morning recess at this time.

(Short recess.) [130]

Mr. Subkow: Has your Honor Exhibits——

(Testimony of Cleon James Moon.)

The Court: 32 to 35?

Mr. Subkow: 32, 33, 34 and 35. Those were the exhibits, except for Exhibit 35, which were a part of the Moon affidavit in the motion for summary judgment, and we have given you another set, and I am using your copy here, so that I can have it during the examination.

The Court: Very well.

Q. (By Mr. Subkow): Will you look at Exhibits 32, 33 and 34, and tell us what these photographs show. First, will you tell us when these photographs were taken and by whom?

A. The photographs were taken by me.

Q. When?

A. The photograph shown in Exhibit 32, which shows the first Waldrip 421 drive-in, was probably taken in July of 1948.

Q. And when were Exhibits 33 and 34 taken, and by whom?

A. Exhibit 33, which shows one of the Waldrip 421 drive-ins with a 90-foot mast, at Conroe, Texas, and was probably taken in May of 1949.

Q. By yourself?

A. By me. Exhibit 34, which is a 421 — no, I can't be sure. It is a Waldrip drive-in, but I am not certain which model it is. It would have to be the third or fourth [131] machine manufactured, and since it is of that type, it would have been taken either in July of 1948 or May of 1949.

Q. And Exhibit 35?

A. Exhibit 35 is the same unit—I would like to

(Testimony of Cleon James Moon.)

correct that. Exhibit 35 is another Waldrip 421, with a 90-foot mast. I don't recall the date that that machine was delivered, or when the photograph was taken. I believe the machine was the one sold to Pacific Western, and that the photograph was probably taken late in 1948 or early in 1949.

Q. Did you take this photograph?

A. Yes, I took all of these photographs, and this photograph, too.

Mr. Subkow: I notice that the list of exhibits fails to give the former identification of this document. It is Exhibit 9 of the Moon affidavit, and if it will be entered on the various lists, it will simplify reference.

The Court: Exhibit 9?

Mr. Subkow: Of the Moon affidavit.

The Court: Which is Exhibit 9?

Mr. Subkow: 35. I will offer these four in evidence.

The Court: These will be received in evidence, Mr. Clerk, as Exhibits 32, 33, 34 and 35.

Mr. Subkow: Now, if your Honor will hold them, I think the testimony will refer to them.

The Court: But I wanted the clerk to mark them in [132] evidence.

Mr. Subkow: Yes. I will wait.

(The exhibits heretofore marked Plaintiffs' Exhibits 32, 33, 34 and 35 were received in evidence.)

[See Exhibits 33, 34 and 35 in Book of Exhibits.]

(Testimony of Cleon James Moon.)

Mr. Subkow: Your Honor, my assistant tells me that I have overlooked an exhibit, Exhibit 27. It is not in evidence, and I would like to introduce this and interrupt at the moment to do so.

Q. Will you look at Exhibit 27, and tell us when you took that photograph, and what it shows?

A. Yes. Referring to Exhibit 27, this is the first or second Waldrup 321 drive-in, and the photograph was taken probably early in May of 1948.

Q. What does it show? Did you take it, Mr. Moon? A. Yes, I took the photograph.

Q. What does it show?

A. And it shows the first or second Waldrup 321 drive-in, with a four-legged 65-foot telescoping mast of the type that we have been discussing here this morning.

Q. In what posture is the derrick?

A. The mast is in the road position, that it has been slid rearward along the track by means of the hydraulic cylinder.

Mr. Subkow: I offer this in evidence, your Honor.

The Court: That telephone pole in the background is [133] not a part of the equipment, is it?

The Witness: No, the telephone pole belongs to the power company.

The Court: Any objection?

Mr. Kenway: No objection.

The Court: Received in evidence as Exhibit 27.

(The photograph referred to was marked

(Testimony of Cleon James Moon.)

Plaintiffs' Exhibit 27, and received in evidence.)

Mr. Subkow: I hope the comment does not mean that I am overdoing the identification of it.

The Court: I was just thinking that whoever took that photograph——

Mr. Subkow: Was a bad compositor?

The Court: ——takes them about like I do. I always come out with something like that in the background which spoils the picture.

The Witness: With all of the open country around there, I should probably have moved it forward a little.

Mr. Kenway: Do I understand that Exhibits 32 through 35 have been offered and received?

The Court: Yes.

Q. (By Mr. Subkow): Will you take these exhibits, Mr. Moon, and using them, describe the construction of these exhibits and the circumstances which led to their design? [134]

Preliminarily, strike that question, and I will ask you this question: Do these exhibits show a unit in which the sliding derrick previously discussed is employed?

A. May I ask which exhibits, Mr. Subkow?

Q. Forgive me. Exhibits 32, 33, 34 and 35.

A. 32, 33, 34 and 35 all refer to Waldrip drive-in units with a fixed hinge type mast.

Q. Where is the hinge positioned in this type of unit?

A. The hinge is positioned above the driver, and

(Testimony of Cleon James Moon.)

arranged so that one hinge is on one side of the driver, and one hinge is on the other side of the driver, in such a manner that when the vehicle is going over the road the legs straddle the driver.

Q. We will proceed further, but will you first describe in a general way the construction of this unit, and in doing so, contrast it with the construction of the units employing the sliding derrick.

A. In this respect reference should be made to the photograph shown in Exhibit 27, and to the print on the board over there, which I believe is Exhibit 23.

Mr. Subkow: Will you hand Exhibit 27 to his Honor?

(The photograph was handed to the court.)

The Witness: In Exhibit No. 27, shown on the derrick, is the derrick track which we have previously discussed.

The derrick has been slid rearward along this track to place it in the road position. Contrasting it, and comparing it in Exhibit No. 32, the hinge point has been fixed. The rear legs have been hinged so that they ride in front of the cab.

Mr. Subkow: Just a moment, Mr. Moon. May I ask you again to mark the features you are referring to on the drawing and on his Honor's copy?

The Witness: Very well. I need Exhibits 32 and 27.

(Whereupon the exhibits were given to the witness for marking.)

The Court: What do you wish the witness to

(Testimony of Cleon James Moon.)

mark? The hinge, Mr. Subkow? Do you wish the witness to mark the hinge, is that what you mean?

Mr. Subkow: He is going to testify about features. I thought if he would mark them at one time that it would save a lot of time. And then he can just go right ahead.

(Whereupon the copies were marked by the witness and given to the court.)

The Witness: Now, once again, comparing Exhibit 27 to Exhibit 32. In Exhibit 27 we show a track in the derrick, the track marked 1. It's in the lower section of the derrick, and is used for the purpose of sliding the derrick back and [136] forth from the road position to the erecting position, and vice versa.

Item 2 of Exhibit 27 is the mast rear leg upon which the track 1 is located. And item 3 is the mast leveling or extending screws which permit the mast to reach the ground and be leveled at ground level.

Now, referring to Exhibit No. 32, item 1 is the fixed hinge located in the position previously described.

Q. (By Mr. Subkow): Just a moment, Mr. Moon. Will you locate it with respect to the derrick and with respect to the chassis?

A. It is located—it is positioned on the derrick.

Q. Have you indicated the hinge position on the derrick?

A. Yes. It is positioned on the derrick at 1, and it is positioned above the driver at—I would like to

(Testimony of Cleon James Moon.)

correct that—above the driver on the frame support members.

Q. Have you indicated the frame support members?

A. I have not indicated the frame support members.

Mr. Subkow: Will you so indicate them by a number?

May we borrow your Honor's copy?

The Court: Yes.

(Whereupon the document was given to the witness and then back to the court.)

Q. (By Mr. Subkow): Now, continue with your description [137] as to the frame support members.

A. The hinge is also located above the driver on frame support member 4, and additional members which cannot be seen because of the guarding, but which exist in the area 4 prime.

Q. Just a moment. Are any such frame support members shown in the patent, Exhibit No. 1?

A. Yes. They are shown in the patent, Exhibit 1, in Figure 6, where they are identified as 14, and by additional structure not numbered.

They are also shown in Figure 11, where again they are identified as Figure 14 and 15, and two angular braces joining the two which are not numbered.

Q. The lower ends are mounted where?

A. The lower ends are mounted on the chassis. The chassis 11, actually—in Figure 11—it's shown as a cross member of the chassis 13.

(Testimony of Cleon James Moon.)

Q. Now, with respect to the structure shown in the Exhibits 32 to 35——

The Court: What is the question?

Q. (By Mr. Subkow): With respect to the supporting framework in the structure, Exhibit 32 to 35, where were the lower ends of that structure connected?

A. They were connected to the chassis, the members identified as 4 and 4 prime, which cannot be seen, were [138] secured to the chassis at points along the chassis.

Q. Now, with respect to this framework, what functions does this framework perform?

A. It supports the mast as it is carried over the road. It forms a protective framework surrounding the driver as he is driving over the road. It also forms a protective framework surrounding the driver if he has to move the mast while it is in a partially erected position. And it acts as a framework to carry loads transferred from the mast through the framework and into the ground.

Q. Why do you say it protects the driver under those conditions?

A. Because in the case of a back-in unit you have a conventional cab which has no framing structure whatsoever of any structural importance. You merely have a sheet metal cab that offers little, if any, protection to the driver in case the rig should suffer an accident.

In this case these members are made sufficiently large to carry loads from the mast into the ground

(Testimony of Cleon James Moon.)

and, consequently, are a very substantial protection for the driver since they surround him, in this respect, that they are on each side of him.

Q. Well, in a drive-in isn't there a support for the forward end of the derrick which passes over the cab?

A. Yes, there is a support for the forward end of [139] the derrick which passes over the cab. It must be high enough so that it does not impair his vision in any way as he drives in. But there is a cross member there which carries the hinge and supports the mast.

Q. When you say "impair his vision," are you talking about forward or upward?

A. Both. It should be arranged in such a manner that his vision upward should not be too badly impaired. In other words, if he leaned forward and looked through the windshield, he should still be able to see upward. And in approaching the well head he should not have any forward vision, either upward or downward, that is impaired.

In many occasions there will be a pumping unit, sometimes a rather large pumping unit, and in certain types he will have to be careful that he does not approach the unit in such a manner as to strike it.

Q. Now, you say that structure would not protect the driver in case of some trouble or other?

A. Oh, the structure shown in Exhibit 32 would offer very good protection to the driver.

Q. I think we are discussing two different things.

(Testimony of Cleon James Moon.)

I will come back. I am now referring to the structure that supports the forward end of the derrick in the back-in unit, and I ask you whether your testimony with regard to impairment of vision referred to the back-in unit or the drive-in [140] unit.

A. Well, my previous testimony refers to the drive-in unit.

Q. Well, let's go back. I think we have had a misapprehension.

You testified that this supporting structure protected the driver, and I asked you whether any such structure was present in the back-in unit, and called your attention to the support member for the crown of the derrick where it passes over the driver, and asked you what sort of protection that gave.

A. I think you are referring to the thing that we have inherited from the old cable tool days and jokingly call it the "headache post." California designers do, anyway.

Q. I think that is what I mean. Let's turn to Exhibit 12 and I believe that using something before us we won't get into any confusion.

Mr. Kenway: If your Honor pleases, I haven't been furnished with a copy of Exhibit No. 12. Could I go to the witness stand so that I might see it?

The Court: The clerk will hand you the exhibit.

Mr. Kenway: I don't want to take your Honor's copy.

(Testimony of Cleon James Moon.)

The Court: No. I have seen that enough. I think I know it by heart.

Mr. Kenway: Thank you. [141]

The Court: Let's proceed, Mr. Subkow.

Mr. Subkow: I am waiting for an answer, your Honor.

The Witness: All right. Referring to Exhibit 12. This is a back-in unit using a custom-made conventional-type truck.

Q. Restrict your answer to what you call the "headache post" and we will save time.

A. The "headache post," or the front mast support member, which is shown located above the bumper and in front of the engine, forms a framework of sufficient strength to carry the weight of the mast at that point, but it is not sufficiently strong to afford the driver any protection in case the mast was moved while the—or, the vehicle was moved while the mast was erect, or partly erect; nor does it afford the driver much protection in the case of an accident. [142]

Q. All right. Referring to Exhibits 32 to 35, continue your description of the construction of the exhibits, and refer to your Exhibit 1 for comparison.

Mr. Subkow: Has Exhibit 23 been received in evidence?

The Clerk: My records don't show that it is.

The Court: No, it has not been offered as yet.

Mr. Subkow: I offer it in evidence.

(Testimony of Cleon James Moon.)

The Court: Any objection? That is the large drawing?

Mr. Kenway: I understand it is offered to show what is in the patent, and on that basis I have no objection.

The Court: Received in evidence.

Mr. Subkow: I am not accepting any limitation on the introduction in evidence.

The Court: It isn't plain. As I understand, it is a large scale drawing of what is shown in the patent.

Mr. Subkow: No, not as to the detail shown in the patent. However, we will not accept at this moment any interpretation of the evidentiary value of that exhibit.

Is it received in evidence, your Honor?

The Court: Yes, it is received.

(The exhibit heretofore marked Plaintiffs'

Exhibit 23 was received in evidence.)

Q. (By Mr. Subkow): Go ahead, Mr. Moon.

A. We were comparing the type of structure shown in Exhibit 32 and Exhibit 27. I have explained how the track [143] 1 was used, and how the hinge 1 was used, and how the loads applied at hinge 1 in Exhibit 32 were carried into 4 and 4-prime.

Additionally, in Exhibit 32 the rear leg 2 was carried forward of the hinge, and hinged and secured against the vehicle in such a manner as to be out of the way and not exceed the 3-foot overhang requirement.

(Testimony of Cleon James Moon.)

Also, the top leg extensions 3 were retracted and made of a sufficient length so that they could be moved forward or slid rearward, so that when the mast was erected the legs would reach the ground and could be secured against the ground by using the leveling screws at the end of the leg to lower the mast and carry portions of the applied derrick load.

Q. Was there any similar construction shown in your patent?

A. Yes, there is a similar construction shown in the patent. Referring to Exhibit 1—

The Court: In Figure 1?

The Witness: Exhibit 1, and Figure 1, your Honor, I refer to the hinge point 17 as being similar to hinge point 1 shown in Exhibit 32, and shown again in Figure 3 and Figure 4 the same type of relationship exists.

In Figure 6, as we have previously testified, load carrying members 14 and adjacent members compare with 4 and [144] 4-prime in Exhibit 32, and the leg extensions 25a—

Q. (By Mr. Subkow): May I call your attention to Figures 3 and 4, too?

A. Thank you. Again referring to Figures 3 and 4, the leg extensions 25a, which consists of screw jacks are extended after the mast is erected so that they rest upon the ground, and can be used.

Q. I notice in the patent that the length of the extensions appear to be shorter than the length of

(Testimony of Cleon James Moon.)

the extensions in the exhibit to which you are referring, Exhibit 32.

A. I don't believe that that is very material. It was the habit of designers to make these legs any length they chose so long as they reached the ground and transferred the leg loads after the mast was erected.

Q. In other words, they could be made as long as you needed, or long enough to reach the ground, like Lincoln's legs? A. That's right.

Q. Now, referring to Exhibit—I think it will be 34, will it not? I have given away my exhibits, and I have had to use yours, so my numbers have disappeared.

A. That is Exhibit 28. Oh, no, no.

Q. No. Now, was this unit when photographed ready for delivery and licensed by the State for transport? [145]

A. The unit was ready for delivery. The license I can't testify to. It was our habit to use, at least for road testing until we got the unit officially licensed, to use either a dealer license or one of our truck licenses. I suspect the latter was slightly illegal, but we were running our road tests locally, and I can't testify as to where that license came from.

Q. All right. Now, that exhibit shows the extensions retracted inside the upper legs?

The Court: Are you referring to Exhibit 34 now?

The Witness: Exhibit 34.

(Testimony of Cleon James Moon.)

Mr. Subkow: Your Honor, as I said, they have stolen my exhibits.

The Court: Exhibit 34?

The Witness: That is correct, your Honor.

The Court: And you referred to that in your previous answer with respect to license plates, didn't you?

The Witness: Yes, sir.

Q. (By Mr. Subkow): Now, looking at Exhibits 34 and 32 and 33, can you state the posture of the legs with respect to the driver's position?

The Court: Isn't that very apparent in the photograph?

Mr. Subkow: If it is apparent, I withdraw the question.

The Court: You know, we are almost at the end of that day and a half that was estimated to try this issue. [146]

Mr. Subkow: Yes, your Honor, we are, but I think I am entitled to a little leeway. I think I will finish this afternoon.

The Court: Well, you will remember both sides estimated two days?

Mr. Subkow: Your Honor, I meant to say for my side. I didn't intend to include theirs.

The Court: Well, I don't expect to limit you, but it seems to me that the matters are perfectly apparent to anyone from the photographs.

Mr. Subkow: I was thinking of my record as well.

The Court: Ask him a leading question on the

(Testimony of Cleon James Moon.)

subject, then, and I think it will not be objected to, if you want the record to show it.

Mr. Subkow: I think the witness can answer the question promptly, and we will save time.

The Witness: In the position shown in Exhibit 34, the legs straddle the cab.

Q. (By Mr. Subkow): Is that true with both the top and bottom legs?

A. Yes, that is true with both the top and bottom legs.

Q. With respect to the other features of the design, the structures as shown in these Exhibits 32 to 35 correspond, do they not, to those shown in Exhibits 27 to 31, and to the [147] features which you have described in your patent in suit?

Mr. Subkow: It is a leading question, and I hope your Honor will excuse it.

The Court: Unless the other side objects, all right. You might be surprised, and they might never object.

The Witness: I am afraid you lost me, and I will have to ask the court reporter to repeat the question.

Mr. Subkow: I am really ashamed of my question.

(The question referred to was read.)

Mr. Subkow: Your Honor, at this time it had been my intention——

The Court: Do you want an answer to that question?

(Testimony of Cleon James Moon.)

Mr. Subkow: I am sorry. I thought we did have. I am sorry. Let's have the answer.

The Court: Can you answer it, Mr. Moon? Do you know the features the question refers to?

The Witness: Yes, I know the features the question referred to. I am trying to get them oriented with respect to the exhibits and——

The Court: Tell us what features the question refers to.

Mr. Subkow: Your Honor, I will go into the details. I thought I was saving time.

The Court: What features? Just name them. It will be the hinge, the legs, the mast. [148]

Mr. Subkow: Yes. Perhaps the witness can tell us, and that will save the question.

The Witness: Did you include Figure 27 in that?

The Court: Exhibit 27.

Q. (By Mr. Subkow): Yes, I intended to include Exhibit 27.

A. Well, in the features shown in 34, 35, and 32——

The Court: Exhibits 34, 35 and 32.

The Witness: ——They coincide with the patent.

The Court: Those are the Waldrip 421 units?

The Witness: Yes.

The Court: What about the 321 units in Exhibit 27?

The Witness: In the case of the 321 unit there is one exception, and that is the track is not identical with the patent.

The Court: That answer then would apply to

(Testimony of Cleon James Moon.)

the photographs, Exhibits 27, 28, 29, 30 and 31, would it not? They are all of the 321 unit?

The Witness: Yes, sir.

Mr. Subkow: Now, your Honor, I had intended, had you permitted me, to go on with the presentation of the infringement feature to develop a point in connection with that feature, and if we are going to determine the issue of validity, I would want to present it at this time.

The Court: If it has any bearing—— [149]

Mr. Subkow: It has a bearing on the question of validity, yes, sir.

The Court: That is the trouble with trying these issues separately. You cannot always separate them. In case of doubt, why, put it in.

Mr. Subkow: It has thrown some confusion on my scenario here.

The Court: In case of doubt, if you feel it has a bearing on the issues, why, I want to hear it.

Mr. Subkow: Very well. On the presentation of the question of how the loads got to the ground and then through the structure, I was in some doubt whether it was sufficiently clear, so we have developed a piece of demonstrative evidence, a copy of which was shown to the defendants, who just received it this morning, and all we could do was to show it this morning. Perhaps I should have the witness identify it, or perhaps if I make a statement, and it will be agreed to, it will save testimony.

(Testimony of Cleon James Moon.)

The Court: Do you want it marked for identification?

Mr. Subkow: It is already in the list of exhibits, one of the missing exhibits. If you will give me a moment, I will find my place in the list of exhibits.

Yes, it is Exhibit 95. The drawing is not too inconvenient for your Honor to handle. It is not too large.

The Court: Very well. [150]

Mr. Subkow: I will have it marked for identification at the present time.

The Court: It will be so marked.

(The exhibit referred to was marked Plaintiffs' Exhibit 95, for identification.)

Mr. Kenway: Mr. Subkow, I am confused. On my list of exhibits, which you gave me, you identify Exhibit 95 as Exhibit 59 with derrick erected, and I look back at Exhibit 59, and that says, "Reduction of same."

Mr. Subkow: If you will look at 58, you will see that it is Exhibit 4 of the Woody deposition, which was a tremendously large drawing, and I had it reduced in size, and this about corresponds to the size of the reduction. Therefore, I made reference to the reduction rather than the original exhibit. You will have a copy of our reduction as well.

The Court: Exhibit 95, for identification, shows the device of the patent in suit, does it, with the derrick erected?

Mr. Subkow: No, your Honor, it does not. It was designed to show the defendants' structure, but

(Testimony of Cleon James Moon.)

it is offered solely for the purpose of illustrating how forces in the derrick are transferred, and those forces apply both to the patent in suit, the Waldrip structure, and the defendants' structure. We will only discuss it with respect to the transference of forces, without reference to whether it is mounted on a [151] defendants' unit.

The Court: Very well.

Mr. Subkow: That is our purpose. Now, will a verification——

The Court: Perhaps it will be stipulated. Does this Exhibit 95, for identification, fairly depict what it purports to depict with respect to the defendants' unit with the derrick erected?

Mr. Kenway: I am sorry, your Honor. I didn't catch what you were asking.

The Court: I say, does Exhibit 95, for identification, fairly depict what it purports to depict with respect to the accused unit, the defendants' unit, with the derrick raised?

Mr. Kenway: May I ask Mr. Woody before I answer that, your Honor?

Mr. Subkow: May I ask also—oh, I am sorry.

Mr. Kenway: Mr. Woody tells me that this does correspond accurately to a drawing which was in evidence at his deposition, but in some respects does not correspond to a unit which was actually constructed by the defendant.

Mr. Subkow: Well, I must say I am surprised, because the deposition says it was.

That is the difficulty. That is the reason why I

(Testimony of Cleon James Moon.)

was going to ask whether the question wouldn't be modified to refer to the structure of the derrick without reference to the structure of the——

The Court: Does the defendant manufacture a particular type of derrick?

Mr. Subkow: These derricks that are shown here are the same type of derricks that are used in the patented structure, and in the Waldrip structure and in their structure. That is why I wanted to——

The Court: There is no claim——

Mr. Subkow: There is no novelty in this. It's the way it is mounted on the structure. The derricks are modified in some respect to apply to it. I only want to use it to illustrate how the forces are applied to it, and where they go, for purposes of illustration of what the patent means. And I am at this point not trying to establish that there is anything that amounts to an infringement at the moment. I am only talking about the patent and the [153] questions of validity. We will come to that later, if your Honor permits us to go to the issue of infringement.

Mr. Kenway: Well, I want to add to what I said that Mr. Woody now tells me that the derrick structure itself accurately shows what the defendant has manufactured.

The Court: And the connection of the derrick to the vehicle, does that show? Is that accurately shown?

(Testimony of Cleon James Moon.)

Mr. Kenway: As shown here the cab appears to extend into the structure of the derrick. And, as a matter of fact, that has not been carried out in any of the units which have been actually constructed by the defendant. And we think that it is a rather important point in view of the language of the claim.

Mr. Subkow: We make no point of it at this moment. The exhibit is not directed to that feature at all.

The Court: Very well. Proceed.

Mr. Subkow: May it be received in evidence, then?

The Court: Any objection?

Mr. Kenway: No objection.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiffs' Exhibit 95, was received in evidence.)

Q. (By Mr. Subkow): Mr. Moon, using this drawing and your patent and the exhibits of the photographs, will you describe how the forces, i.e., the loads, are transferred [154] to the ground?

A. The forces applied at the crown of the derrick result——

Q. Now, the forces applied at the crown where?

A. At the top of the mast.

Q. Is it at the center of the pulley that is shown at the top of the mast?

A. The hook load is applied to the center of the pulley that is shown at the top of the mast.

(Testimony of Cleon James Moon.)

Q. Is that the vertical line that passes through that center?

A. That is the long vertical line that passes through the center.

Q. Ending in an arrow.

A. That is correct.

Q. About one-third the way down?

A. That is correct.

Q. All right. Now, that is the result of the load that is on the hook at the bottom of the drawing.

A. That is right. When the tubing is picked up or the load is picked up, that is the applied load to the hook.

Q. All right. Now, what other loads are there?

A. In addition there is the fast-line load.

Mr. Subkow: I wish you had numbered these things, Mr. Moon. It would be helpful if you did.

The Court: Perhaps he can number them during the noon recess.

We will take the noon recess at this time.

Don't forget your stipulation about correcting yesterday's record.

Mr. Subkow: Yes, sir.

The Court: We will recess until 2:00.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [156]

Wednesday, March 26, 1958. 2:00 p.m.

CLEON JAMES MOON

the witness on the stand at the time of the noon recess, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Subkow: Your Honor, we have placed the exhibit on the board, where it will be testified to. We have given your Honor a duplicate copy of that, so that it would be easier to follow.

The Court: You refer to Exhibit No. 95?

Mr. Subkow: Yes, sir. And for your convenience. Of course, some of these lines are not too visible.

The Court: Now, how about the corrections in the record that you mentioned this morning?

Mr. Subkow: We have stipulated to the corrections in the record. We thought we would give them to the reporter, and ask her to correct your copy as well, and not take the time in open court.

The Court: Very well. That is very good.

Mr. Subkow: May Mr. Moon stand at the exhibit and testify from there?

The Court: Yes.

Q. (By Mr. Subkow): At the end of the examination this [157] morning—

Mr. Subkow: And may I come over there?

The Court: Yes, we may.

Q. (By Mr. Subkow): (Continuing) —we started to describe the forces which occur in the derrick construction which is present in both the

(Testimony of Cleon James Moon.)

back-in and in the drive-in unit described in the patent, and we placed numbers on the exhibit. I notice, Mr. Moon, that the crown of the derrick is shown necked in. Will you point to the portion where it is necked in?

(Witness indicates.)

Q. —whereas in the structure of your patent it is not necked in. Is there any substantial difference as a result of that construction upon the functioning of the structure?

A. Yes, there is some difference. I don't say that it is a substantial difference. The reason that we didn't neck the top in was one, first, of economics, and, second, making all the legs do a near equal amount of work, and this design, because the center or line of the crown is nearer the center line of the front leg, the front leg under some load conditions does do more work than the rear leg, that is, it will be carrying more load in compression than the rear leg will be carrying.

Q. You say the difference is not substantial in the functioning of the device? [158]

A. Not in the functioning of the device. The two designs, if properly designed, will pick up their loads with the A.P.I. factor of safety.

Q. Do they work in substantially the same way or in substantially a different way?

A. They work in substantially the same way.

Q. Now, will you describe the situation of the derrick with respect to its supporting and functioning parts of the structure?

(Testimony of Cleon James Moon.)

Mr. Subkow: Your Honor, at this point I do want to say, in fairness to the defendant, that in using this construction and showing this drawing, there appears to be a structure which reaches from the ground straight up through the back legs. That is not true in the case of the structure of the defendant.

We have brought out here the other views that we would have used had we been discussing infringement, and we point out that these structures here that come down here (indicating) are attached to the members which reach from the chassis up to the hinge point, and then are in the form of outriggers, as if they are straddling the structure instead of straddling the stand up here.

May I ask if that is a fair statement?

Mr. Kenway: Oh, yes. Thank you very much.

Q. (By Mr. Subkow): Will you proceed? [159]

A. You asked about the supporting structure, Mr. Subkow. The supporting structure, so far as the derrick is concerned, is the supporting structure shown as an angle member here at the load L-6, and the straddling structure you just described at the load L-8, and the accompanying frame of the vehicle. Now, additionally, the front leg of the mast is supported on the ground, or in this case on a pedestal which forms a part of the ground.

Mr. Subkow: Will you read that answer, please? I got lost.

(The answer was read.)

Mr. Subkow: Referring to the accompany ex-

(Testimony of Cleon James Moon.)

hibit,—I offer that as Exhibit 94, for identification, your Honor.

The Court: It will be so marked.

Mr. Subkow: —unless it will be stipulated that it may go in evidence in connection with the same limitation as I suggested for the other exhibit.

Mr. Kenway: No objection on that basis.

The Court: What is that? What is 94, for identification?

Mr. Subkow: The same as 95. As we have described, 94 shows how these members, lower members here, are connected to the derrick. They are shown as these outriggers. You are now looking toward the front of the structure.

The Court: The front view of the derrick or mast, is it? [160]

Mr. Subkow: Yes, sir.

The Court: Very well. It will be received in evidence as Exhibit 94.

(The exhibit heretofore marked Plaintiffs'

Exhibit 94 was received in evidence.)

Mr. Subkow: We do not want to mislead the court in any way. The structure which is shown in this figure behind here (indicating) is not the same structure as is shown in 95.

The Court: But both 94 and 95 depict the accused device?

Mr. Subkow: Yes, they both depict the accused device, but different units of the accused device.

Mr. Lyon: I don't know that we agree to that. We insist that there are substantial differences be-

(Testimony of Cleon James Moon.)

tween 94 and 95 and anything that was ever built by the defendant.

Mr. Subkow: They are not offered at this time in proof of the issue of infringement, and I think that will shorten it.

The Court: Very well.

Mr. Subkow: May we re-offer them on the issue of infringement, if necessary?

The Court: Yes. [161]

Q. (By Mr. Subkow): Mr. Moon, referring to Exhibit 94, which is this exhibit to your left——

Mr. Subkow: I suggest the clerk should mark it, shouldn't he?

The Court: Yes.

Proceed, Mr. Subkow.

Q. (By Mr. Subkow): Are there any structures in Exhibit 94 which form part of the supporting structure of the derrick?

A. Yes, there are. The outrigger structure previously described as this support means here and the triangular braces——

Q. The "support means here" is a short vertical section which is left of the figure which appears on the right of the exhibit? A. Yes.

Mr. Lyon: You are not making any record. Why don't you give the witness a pencil and let him mark that.

Mr. Subkow: I think the suggestion is excellent.

The Witness: The support means 1. The terminal——

(Testimony of Cleon James Moon.)

The Court: You are marking the support means with No. 1, is that it?

The Witness: Yes. We use that language when we are marking.

The support means which I have marked 1 is the terminal [162] end of the triangular bracing 2 and 2 prime which is tied into the narrow vertical member 3 and 3 prime, which has diagonals 4 and 4 prime.

The mast is supported upon bearing block 5 and 5 prime, to which are attached the rear legs of the mast 6 and 6 prime. Loads coming down the rear leg or reactions at the terminal ends of the members marked 1 will load the structure in load transverse relationship to the ground. The extent or magnitude of the load and the direction of the load will be determined by the application of the loads to the structure.

Q. Mr. Moon, will you indicate—it appears that the front legs of this derrick on Exhibit No. 95 have been cut off, have they not, to reveal the structure behind them? A. That's right.

Q. Will you indicate the part where the legs have been cut off on the exhibit?

A. I will mark them 7 and 7 prime.

Q. Will you indicate on Exhibit 95 where they have been severed, for purposes of illustration?

A. They have been severed at Section AA.

Q. And also where else?

A. At BB on 94.

Mr. Subkow: What we have done is to chop

(Testimony of Cleon James Moon.)

out a piece of those legs so you can look at the structure, your Honor.

The Witness: And on 95. [163]

Q. (By Mr. Subkow): Go ahead, sir.

A. Your Honor, there are several types of loads that are applied to these masts. There are the loads that are applied during the well pulling operation. There are wind loads which are applied under wind conditions and which have to be taken into consideration if the mast is to meet the API code.

This chart here shows the application of the crown loads when the——

The Court: "This chart" being Exhibit 95?

The Witness: 95. I am sorry, your Honor.

Q. (By Mr. Subkow): Mr. Moon, have you discussed the rigging of the derrick, yet?

A. No, I have not.

Q. Would you? I think that ought to be done.

A. I was going to get into that when I got into the discussion of the crown load.

Q. I will let you go your own way. Thank you.

A. The application of the crown load for pulling tubing is such that it is represented in this figure 95 by the force L-1.

The fast line load, which is represented as the line running from the hoist drum to the crown around and around the traveling block—and in this case this is a five-line system with the dead end anchored to the traveling block, [164] although that is not shown—the fast line load is represented by this force here, force L-2.

(Testimony of Cleon James Moon.)

Q. (By Mr. Subkow): What is the fast line?

A. The fast line is the line that runs from the hoist over the crown, around and around the block, dead-ending either some place in the derrick or behind the derrick, or to the becket of the block. In this case it is intended, on this force diagram, that it dead-end to the becket of the block even though that is not shown in this drawing.

Q. That line lifts the block?

A. That line lifts the block.

Now, the mast is secured against overturn by guy wire to the back end of the vehicle. The vehicle is heavy at this point, and the mast is tilted slightly forward. Without this back load carry guy the mast would fall forward. It restrains the mast from going further forward. It's a rather large line in most cases if it is doubled.

The mast has to be the resultant of the forces. Consequently, a line drawn from the center line of the crown parallel to the angle of the mast will be the direction of that force. Now, to close our polygon of forces, we introduce the angle of the guy, and the length and angle of that guy is placed on the force polygon to the point where it intersects with the resultant of the forces which are in the mast. [165]

The length of that force shown on this chart is the magnitude of the force in the guy wire.

Now, resisting those forces we have reactions, because for every force there has to be an equal and opposite reaction. So, we have a reaction at the

(Testimony of Cleon James Moon.)

front leg at R-1. We have reactions at the rear leg at R-2. We have reactions at the point under the ram at the jack, if that jack is used, at R-3. If that jack is not used, the loads that go into the frame are transferred to the wheels fore and aft or into any other jacks that might be located along this plane.

Now, the amount that is in these places depends entirely upon the amount that is applied to the mast and the way that it's applied to the mast.

In addition to those forces the back guy and the fast line have forces of their own. Now, if we are applying a force into the guy in this direction it obviously is lifting up in a vertical force and, depending upon the angle of the guy, pushing forward in a horizontal force.

The same thing is true of the fast line. It is lifting up and it is pushing forward. Resisting that is the tilt of the mast which is wanting to push back at R-5 and at R-4. So that we have forces going through the vehicle frame and through the angular member where the load L-6 is shown and pushing against the hinge point at R-4 and [166] resisted by the ground at R-5.

Now, that's an over-simplification of the forces that exist as necessary in a load carrying condition when we are pulling a well.

Q. What is the consequence of the fact that the back legs meet the hinge point at an angle to the vertical upon the resultant forces in the angular member, and where are those forces transmitted?

A. Those forces——

(Testimony of Cleon James Moon.)

Q. Will you please state the consequence, first?

A. The consequence is that they go down both members.

Mr. Subkow: Will you read the question to the witness?

(Question read.)

The Witness: The forces are transmitted at the hinge point. The force coming down the back leg, whether it is a large compressive force or a small compressive force are such that they are directed at an angle to this vertical member here and this angular member here. In other words, the compressive load falls between those members. And if it falls between those members it loads the vertical member and it loads the angular member in compression.

Now, the nearer it is to vertical the less compressive load you would have in here—that is, in the member where the load L-8 is shown. And——

I am sorry. I got crossed up a little bit there. I [167] would like to go back and explain again.

The nearer this leg is to vertical——

Q. This the back leg?

A. The nearer the back leg is to vertical, the more load will go into the leg shown as L-8 and the less load will go into the diagonal member where the load L-6 is indicated. [168]

Q. Mr. Moon, what would happen in this situation, with the guy line strung, the fast line connected, and the load on the hinge, if someone were to disconnect the derrick at the hinge from the supporting structure which you have described?

(Testimony of Cleon James Moon.)

A. We would also have to disconnect this resisting member, which I will call 8 on Exhibit 95, but if resistance was taken away from the hinge point at that point, in other words, if the bearing were free, and if that were free (indicating), the vehicle would move into the mast. It would be pulled into the mast by the horizontal forces on the fast and dead line.

Q. And when it is connected at the hinge, what prevents that from occurring?

A. The angle brace where the load L-6 is shown, and the frame which is connected to the angle brace at load L-6.

Q. And the resultant force finally goes where?

A. The resultant force finally goes into the ground from the frame, either from the jacks or through the wheel.

Q. Mr. Moon, you have made an assumption of a force situation in drawing this diagram. Will you state what that assumption is?

A. Well, the assumption is that those are the applied loads at the crown.

Q. You have assumed that the length of the vectors [169] which end in arrows have the relationship in magnitude that are shown by the length of the lines indicated: is that correct?

A. In this sketch, yes. I have assumed a five-line string-up, which eliminates the complexity of the dead line, and that is the only reason this is done here. We merely wanted to simplify the force diagram.

(Testimony of Cleon James Moon.)

I have assumed a five-line string-up which is proportional to this length here, the length L-1. The introduction of the fast line, since we do have a five-line string-up, the fast line force would be one-fifth of the length of this line, and we have taken in that angle and length of one-fifth, the force known at L-2, and the angle parallel to the fast line has been introduced into the force polygon.

Q. And you have assumed no wind load, have you?

A. There are no wind loads assumed in this structure at all. When we design a mast, the wind loads—we are not required to assume the wind loads simultaneously with the applied column loads to the mast, the crown loads.

Q. But they exist, do they not?

A. But they do exist.

Q. If they exist, what would their effect be upon the position of your resultant load line, and the distribution of the load between the front legs L-4 and L-5?

Mr. Kenway: I must object to that because it obviously would vary with the direction of the wind, would it not? [170]

Mr. Subkow: I was going to bring that out. I was trying to get a fair representation.

The Court: Do you accept a stipulation as to that?

Mr. Subkow: Of course. That was coming next.

Q. Will you proceed?

A. Mr. Kenway is right. It does vary with the

(Testimony of Cleon James Moon.)

direction of the wind, and with the application, the amount of the wind. Assuming that the wind load is blowing against the front face of the mast in a manner thus (indicating), the resultant would swing toward the lower leg, and would put more compression on the rear leg of the mast. Vice versa, if it was blowing in the opposite direction, it would put more load on the front legs of the mast, more compressive load.

Q. You have also assumed, have you not, that there was an equal firm foundation under all of the supporting leg structures, have you not?

A. That is correct.

Q. It frequently happens in the field that that situation does not occur, doesn't it?

A. That's right.

Q. What would the result of a non-equal earth bearing load have upon such forces?

A. The result of the unequal soil bearing is that you have an applied load system which is indeterminate. [171] Unless you know the resistance of the soil bearing at any location, you cannot design the mast by determinant means. Frequently we find in the field the soil under a portion of this structure along here, that would be the structure alongside the R-3, R-2 and R-1. Frequently a portion of that, particularly the portion nearer the well head, will become wet due to well fluid, and the reactions will transfer rearwardly. Now, it is possible that they could do the same thing in the opposite direction.

Q. Now, in designing and constructing a struc-

(Testimony of Cleon James Moon.)

ture of this kind, do you design and construct so that the structure will be stable under various conditions which occur in the field?

A. The A.P.I. column formula would be a factor of safety of 2. That takes care of most soil indeterminate conditions, even though it would have the effect of reducing your safety factor.

Mr. Subkow: The structures which you constructed and sold by Waldrip, and the structure as designed in your patent are designed—that is a leading question, your Honor.

The Court: Go right ahead until they object.

Mr. Lyon: It is also a compound question and assumes a fact not in evidence, to wit, that the structure that he sold was the structure that he patented, and on that ground I think we ought to enter an objection. [172]

The Court: Suppose you reframe it.

Mr. Subkow: I was afraid I was getting into trouble.

Q. The structure which is shown in your patent and also the structures which are shown in the photographs of the Waldrip unit, are they capable of taking the load at both the front and the rear legs, and if the conditions are such as to throw the load onto the front legs, to take them on the front legs?

A. Yes, they are.

Mr. Subkow: I have an unmarked exhibit, your Honor, which is a photograph we took on Saturday, and which I have given opposing counsel.

The Court: Do you wish it marked?

(Testimony of Cleon James Moon.)

Mr. Subkow: I wish it marked next in number, Exhibit 96.

The Court: It will be so marked.

(The photograph referred to was marked Plaintiffs' Exhibit 96, for identification.)

Mr. Subkow: Will you resume the stand, Mr. Moon.

(The witness resumes the stand.)

Mr. Subkow: Your Honor, we will not introduce the easel into evidence.

The Court: Very well. The clerk will take care of that.

The Witness: I have got my eye on it.

Q. (By Mr. Subkow): Will you identify this photograph? [173]

A. Yes, this is the photograph taken on Saturday, March 22, 1958, by Benjamin P. Bayliss.

Q. Were you present?

A. I was present. It was taken in the yards of the General Petroleum Corporation at Wilmington.

Mr. Subkow: Has your Honor the photograph?

The Court: No, I haven't seen it.

The Clerk: I gave it to the witness.

Mr. Subkow: It is more important that the court have it.

The Clerk: Oh, I am sorry.

(The photograph was handed to the court.)

The Witness: (Continuing) And it is the present version of the first Waldrip 321 drive-in that Waldrip manufactured.

Q. (By Mr. Subkow): In what respect is it

(Testimony of Cleon James Moon.)

different from the 321 unit as you manufactured it?

A. The sliding track on the first machine has been eliminated on this unit, and has been replaced by a different front leg system.

Q. Where is the hinge position?

A. The hinge position is above the driver's position, and to each side of the driver's position.

Q. Is it mounted on the derrick and on the chassis similarly to those shown in the exhibits——

A. 34?

Q. ——32 to 35? [174]

A. Yes, it is mounted in a similar manner to those exhibits.

Q. Referring to Exhibit 35,——

Mr. Subkow: May your Honor look at that?

The Court: I have it before me.

Q. (By Mr. Subkow): ——is the construction and rigging of the derrick as shown in Exhibit 35 similar to what you described the connection with respect to Exhibit 95?

A. The construction and the rigging, as far as the block, the traveling block and the crown is concerned is quite similar, but you will notice that the customer in Exhibit 35 is guying the mast to the ground, and not to the vehicle.

Q. What about the intermediate guy, which proceeds to the middle of the derrick and to the vehicle?

A. The intermediate guy was a method of top-section erection that we had,——

Q. I see.

(Testimony of Cleon James Moon.)

A. —and does not concern the structure in any other way.

The Court: Do the forces operate upon it in the same way as you described as to Exhibit 95?

The Witness: The forces act upon it in the same way, except the guy forces which are secured to the ground could not act horizontally against the frame of the vehicle. Now, [175] in the——

The Court: I was referring to the intermediate guy.

The Witness: Oh, the intermediate guy, it is slack at the time of the load application. It is not really a guy. It is a top-section lifting mechanism.

Q. (By Mr. Subkow): Mr. Moon, have you and your associates entered into any licensing agreements with other manufacturers under this patent?

A. Yes, we have.

Q. Will you state the names?

A. We have entered into license agreements with Hopper Machine Works of Bakersfield, Ideco of Dallas, Texas, and Wagner-Morehouse in Los Angeles.

Mr. Subkow: The elaborate preparation has broken down, your Honor. We haven't got three exhibits with us. Oh, they are all here.

Your Honor, with these exhibits I will be through with Mr. Moon. I wonder if we could take a short recess while I collect these things, or is it too early?

The Court: Yes, we will take a recess. We will recess subject to call.

(Testimony of Cleon James Moon.)

Mr. Subkow: We will be ready in just a few minutes.

The Court: Five minutes?

Mr. Subkow: Five minutes.

The Court: Very well.

(A short recess.) [176]

Mr. Subkow: They tell me that this Exhibit 96 has not yet been offered in evidence.

The Court: That is a photograph?

Mr. Subkow: Yes, your Honor.

The Court: Any objection?

Mr. Kenway: No objection, your Honor.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiffs' Exhibit 96, was received in evidence.)

Mr. Subkow: Will you turn to Exhibits 47, 48, 49, 50 and 52, and as a group state—well, first state what Exhibit No. 47 represents.

The Court: No. 47?

Mr. Subkow: Yes, sir.

The Court: No. 47 is a catalog, isn't it?

Mr. Subkow: This is it. It's a Hopper catalog.

Q. (By Mr. Subkow): Is this catalog——

The Court: Hopper Machine Works of Bakersfield.

Mr. Subkow: Yes, your Honor.

Q. (By Mr. Subkow): Are they one of your licensees, Mr. Moon? A. Yes, they are.

Q. Turn to page 2366 and 2367. Will you indicate where the hinge point of the derrick is in this structure?

(Testimony of Cleon James Moon.)

A. On page 2366 I have indicated by the letter H [177] where the hinge point is as shown in Figure 14.

On page 2367, Figure 16, Figure 17, Figure 18, I have located the hinge point where it is shown on the derrick and the derrick supporting structure.

Q. Will you generally state, as a group, what exhibits 48, 49 and 50 indicate?

A. They are catalogs.

Q. No. 48, 49 and 50 are photographs, Mr. Moon.

A. They are photographs of the Hopper design of a drive-in unit.

Q. Does the H on that photograph indicate the hinge point?

A. The H on those photographs indicate the hinge point.

Q. Are they the structures contained in the Hopper catalog, Exhibit No. 47, at the places indicated by you?

A. They are either the structures or very similar structures.

The Court: They are all manufactured by Hopper under the license?

The Witness: Yes, sir.

Mr. Subkow: May further proof of foundation be waived and these four documents go into evidence with numbers indicated?

The Court: 48, 49, 50 and 52? Any objection?

Mr. Subkow: 48, 49 and 50, your Honor. 52 is not included in the offer.

(Testimony of Cleon James Moon.)

The Court: 48, 49 and 50. Any objection to the offer of those photographs?

Mr. Subkow: Including, also, No. 47, the catalog

Mr. Kenway: Mr. Woody tells me, your Honor, that Exhibit No. 48 is a photograph of a Franks unit and not a Hopper.

Would you check that, Mr. Subkow?

Mr. Subkow: I will show you my 48. Perhaps you are confused in the numbers.

(Whereupon the exhibit was shown to counsel.)

Mr. Kenway: That isn't what you handed me.

The Court: You gentlemen have an over-supply of photographs around here, apparently.

Very well. The Hopper catalog, Exhibit No. 47, is it straightened out, now?

Mr. Kenway: Yes.

The Court: Any objection?

Mr. Kenway: I have no objection.

The Court: Exhibit Nos. 47, 48, 49 and 50 are received in evidence.

(The exhibits referred to, marked Plaintiffs'

Exhibits 47, 48, 49 and 50, were received in evidence.)

Q. (By Mr. Subkow): I will now hand you Exhibit 51 and Exhibit 52, and ask you to turn to page 2711. [179] A. All right.

Q. Will you state what that catalog indicates?

A. This catalog, which is the Ideco catalog No. 57, on page 2711 shows the Ideco version of a drive-in unit in the figure captioned "Drive-in

(Testimony of Cleon James Moon.)

Rambler with quick lift, 89-foot C mast, GM 6-110 Diesel engine.”

Q. You have marked the hinge point?

A. I have marked the hinge point by the letter H.

Q. And the photograph, Exhibit No. 50?

A. Exhibit No. 50 is a photograph of the same, or a similar unit manufactured by Ideco, with the hinge point marked by the letter H.

Q. Is this structure manufactured under license under this patent?

A. Yes, the structure is manufactured under license of the patent.

Mr. Subkow: Further foundation waived, and may these two exhibits go into evidence as Exhibits 51 and 50?

The Court: 51 and 52, isn't it?

Mr. Kenway: 50 is the Hopper unit, according to the evidence.

The Court: Any objection?

Mr. Kenway: No objection.

The Court: Received in evidence. Exhibits 51 and 52. [180]

(The exhibits referred to, marked Plaintiffs' Exhibits 51 and 52, were received in evidence.)

Q. (By Mr. Subkow): Turning now to Exhibit 53, which is the Wagner-Morehouse catalog, will you identify what page—does this show a drive-in unit?

A. Yes, on page 5309 the Wagner-Morehouse

(Testimony of Cleon James Moon.)

catalog 57 shows their variation of a drive-in unit, with the hinge point marked at H.

Q. Is this structure manufactured under a license under the patent in suit?

A. Yes, this structure is.

Mr. Subkow: May this catalog go into evidence without further evidence?

Mr. Kenway: No objection.

The Court: Exhibit 53 is received in evidence.

(The exhibit heretofore marked Plaintiffs'

Exhibit 53 was received in evidence.)

Mr. Subkow: Your Honor, that terminates the direct examination, I believe, with Mr. Moon.

The Court: Any cross examination?

Mr. Kenway: Yes, your Honor.

Mr. Subkow: Oh, your Honor, I am sorry, there was just one question I planned to ask him and forgot. May I reopen and ask him?

The Court: You may.

Q. (By Mr. Subkow): Mr. Moon, you have testified before that the units, the back-in units are illegal, and that they [182] are overweight, and you have testified with respect to the legality of the structure which you have manufactured and sold under the patent by Waldrip. Is it possible to load the drive-in units so that they will be illegal?

A. Yes, it is. Also, if the drive-in unit is improperly designed, it can be overweight.

Q. It depends upon how much stuff you load on the truck; is that not true?

A. That is correct.

(Testimony of Cleon James Moon.)

Q. Now, for the same horsepower and well-pulling capacity of whatever standard is used for comparison of these structures, could you place more equipment and structure on the drive-in than on the comparable back-in unit? A. Yes, you can.

Mr. Subkow: That concludes it.

Cross Examination

Q. (By Mr. Kenway): Mr. Moon, have you Exhibit 33 in front of you?

The Court: The photograph of the Waldrip drive-in unit, is it?

Mr. Kenway: Yes, your Honor.

The Court: Do you have it, Mr. Clerk?

The Clerk: Yes, I do.

The Court: Will you hand it to him? [183]

(The document was placed before the witness.)

Q. (By Mr. Kenway): You testified that was a Waldrip unit with a 90-foot mast? A. Yes.

Q. Is that unit legal, as it is shown here?

A. Not as it is shown there.

Q. It has too much——

Mr. Subkow: Just a moment. May we see that? Go ahead, sir.

Q. (By Mr. Kenway): Is that because the overhang in front is too great? A. That's correct.

Q. In the brochure of Exhibit H, which is the Waldrip publication for design information concerning the various units. Would you agree that your prospective customers are thereby informed

(Testimony of Cleon James Moon.)

that the units will be legal with a 60 or 65-foot mast, but if they take the optional 90-foot mast the unit would not comply with the California laws?

Mr. Subkow: I think the exhibit should be placed before the witness, your Honor.

The Court: What exhibit is it?

Mr. Kenway: Defendants' Exhibit H.

Mr. Subkow: That assumes a fact not in evidence, your Honor, and I object. The evidence is not that this brochure was exhibited to customers or it was used to show them what the [184] structure was. The evidence is that it was made up for the engineering department.

Mr. Kenway: He testified on his deposition, I believe, that it was made up so that——

The Court: Why don't you ask him, and that will take care of the difficulty.

Q. (By Mr. Kenway): Didn't you testify on your deposition, Mr. Moon,——

The Court: Just ask him what the fact is, to shortcut it.

Q. (By Mr. Kenway): Were these brochures to be used by salesmen in discussing prospective sales with customers?

A. Our sales manager had one of these brochures. He was permitted to discuss the information in this brochure with the customer, with the understanding that the information was confidential information.

Q. And that information was to the effect that

(Testimony of Cleon James Moon.)

a unit equipped with a 90-foot mast would not be legal; isn't that the fact?

A. Is there a place in there that says that?

Q. Yes, sir. To save time, I will show you my copy (indicating on exhibit).

Mr. Subkow: May I see it?

(The document was handed to counsel.)

Q. (By Mr. Kenway): You agree, then? [185]

A. No, sir, I do not agree with that.

Q. You have changed your mind, since this was written?

A. Not at all. At the time that that was written, we may have thought that we could not make the units legal with the 90-foot mast in California. On the other hand, we made three of those masts, and they were all legal. We did not build a drive-in which was not legal in California.

The structure in the photograph to which you refer, Exhibit 33, is being prepared for erection, and the front legs have been—the top legs and the front legs have been pulled out so that the mast may be raised. They are slid back when the mast goes over the road.

Q. How about the 622 unit? That was a back-in Waldrip unit. Was that legal? A. No, sir.

Q. And were any of those actually built?

A. Yes, we built two of them.

Q. When were they built?

A. I believe the first one was built in 1947, before the first drive-in. I think that probably it was

(Testimony of Cleon James Moon.)
delivered in December of 1947. I can't be sure about that date. My memory is a little hazy.

Q. When you applied for the patent in suit, Exhibit 1, I take it you had in mind that the driver in the cab would have the controls for operating the derrick right in the cab? [186]

A. That was under consideration.

Q. Well, I direct your attention to column 2, at line 40, and the language reading:

“The improved visibility imparts a surer control by the driver who is in control of the lifting mechanism.”

I took that to mean that he had the lifting controls right in the cab.

Mr. Subkow: Is this cross examination directed to the issue of validity?

Mr. Kenway: Indeed, it is.

Mr. Subkow: On what issue stated in the pre-trial conference order? May I inquire through the court: On what issue stated in the pretrial conference order is that question directed?

Mr. Kenway: Well, it has to do with the reversal of parts, as you will see a little later.

It also has to do with the language of the claims. For example, the claims all specify—well, in Claim 1, for example, it says that the legs of the derrick straddle the cab, and it would appear from the file wrapper that the Examiner was induced to allow this patent on the theory that if you stick the cab right up there in the derrick, then the operator can see up the derrick and operate the various controls.

(Testimony of Cleon James Moon.)

Mr. Subkow: That can only be material on the issue of infringement.

Mr. Kenway: Not at all.

Mr. Subkow: ———whether or not the claims cover their structure. It can't affect the issue of validity.

Your Honor having formulated the issues at the pretrial——

The Court: That would go to infringement, wouldn't it,—the scope of the claim? If it is a valid claim at this point, why, we must assume on the trial of the issue of infringement whatever the patent teaches, must we not?

Mr. Kenway: But I think I am entitled to explore just what it is that is covered by the patent. My brother has gone into tremendous detail on all of the background events leading up to the alleged invention, and so forth, and what I am attempting to do here is to narrow it down, to see just what there is that is valid or not.

The Court: Suppose you reframe your question.

Q. (By Mr. Kenway): Was it a part of what you conceived your invention to be at the time you filed the patent application that the driver in the cab have controls for the operation of the derrick in the cab?

A. In this respect are you referring to hoisting controls?

Q. Well, you tell me, either hoisting controls, or the [188] controls for erecting the derrick, or both.

A. We never at any time considered that the hoisting controls would be in the cab.

(Testimony of Cleon James Moon.)

The Court: What about the other controls?

The Witness: We did consider that the derrick erection controls might be placed in the cab. However, experiment, your Honor, determined the best place would be on the outside. [189]

Mr. Subkow: Your Honor, I would ask that the question be read to the witness. I don't think the witness understands the import of the question.

May the question be read, and may we then have the answer?

The Court: Please read the question, Mr. Reporter.

(Record read.)

The Court: That's at the time the patent application was filed.

Mr. Subkow: What was that?

The Court: The question refers to the time of the filing of the patent application.

Mr. Subkow: I understand that. I want to know whether the witness understands the question.

The Court: As to time?

Mr. Subkow: No. As to what the question he was asking.

The Witness: Well, no, because the question is in two parts.

The Court: Why not take it one part at a time?

The Witness: Well, reading the patent——

The Court: The question is what you conceived your invention to be at the time you filed the application for the patent in respects called for.

The Witness: Very well. "The improved visibil-

(Testimony of Cleon James Moon.)

ity in parts assure control by the driver who is in control of the lifting mechanism——” [190]

That is the derrick-lifting mechanism, the mechanism to raise the derrick when removed into location.

Q. (By Mr. Kenway): And you never at any time wanted to put the controls for operating the traveling block in the cab? A. No.

Mr. Kenway: May I have Exhibit T-1 given to the witness, please?

The Court: Is the defendant following the list of its exhibits which are defendants’ exhibits which are set forth in the pretrial conference order?

Mr. Kenway: I am not sure that it was.

The Court: Do you have a revised list?

Mr. Lyon: Yes, your Honor.

The Court: I haven’t seen it.

Mr. Subkow: Neither have we.

Mr. Lyon: We have been in court all day. Last night at 5:00 o’clock I gave it to my secretary to have it retyped. I will have it tomorrow morning. But I didn’t anticipate we were going to get to our case today, so I don’t have it.

The Court: Very well.

Exhibit T-1 is what?

Mr. Kenway: A book of copies of patents which were cited in the file wrapper in the patent in suit. And I am not offering the exhibit at this time except for purposes [191] of identification.

(Testimony of Cleon James Moon.)

The Court: Apparently S is a book of prior art patents. Is that here?

That's a different book?

Mr. Kenway: That is a book of prior art patents which were not cited by the Patent Office and on which we rely in part on our defense of invalidity.

The Court: And T is the book of patents which are cited?

Mr. Kenway: T-1 is the book.

The Court: T-1.

Mr. Kenway: Yes, your Honor.

The Court: Do you have it, Mr. Clerk?

The Clerk: T-1 is before the witness now.

The Court: You have placed it before the witness?

The Clerk: Yes, your Honor, I have.

The Court: Very well. I thought you were looking for it.

And your question, Mr. Kenway?

Q. (By Mr. Kenway): Would you look at the first patent in the book, T-1, the McEwen patent, 2,331,558—

Mr. Subkow: Just a minute.

The Court: Do you have that before you?

The Witness: Yes, I do. Thank you.

The Court: What is your question?

Q. (By Mr. Kenway): With reference to Exhibit No. 95, I would like to ask you whether the load as it is applied to [192] the derrick shown in that McEwen patent, particularly at Figure 3 dif-

(Testimony of Cleon James Moon.)

fers materially from the conditions you described in connection with Exhibit No. 95?

Mr. Subkow: Your Honor, that is on the issue of validity, I concede; but they are using patents which were not cited for the purpose as prior art. Their stipulation and admissions and the answers to interrogatories which we read into the record state that they do not include these, and I object to the use of these patents as contrary to the pretrial order, contrary to their admissions, contrary to their answers to interrogatories, and the fact that we were not given notice under the statute.

Mr. Kenway: You will recall that I examined the witness about this patent at the time of his deposition. So, you can't be surprised at that.

The Court: But was statutory notice given in reliance based upon these patents?

Mr. Kenway: This is not a patent we are relying on as anticipating the alleged invention, your Honor, in the herein suit. This is part of the file wrapper and shows the state of the art.

Mr. Subkow: The question as to part of the file wrapper can only be material as showing what the Examiner considered and what he allowed.

The Court: It is part of the prior art. [193]

Mr. Subkow: Then, your Honor, I shall read their admission and statement which says they would not rely on that as part of the prior art.

Mr. Kenway: We are not relying on this patent as anticipating the patent in suit. We are not going

(Testimony of Cleon James Moon.)

to ask your Honor to declare the patent in suit invalid in view of this McEwen patent.

The witness has testified that he did not invent derricks.

The Court: Even though the defendant doesn't rely upon it as anticipating the patent in suit, it is still admissible to show the state of the prior art.

Mr. Subkow: Not when stipulated that he will not rely on it.

The Court: Well, rely on it for what?

Mr. Subkow: As part of the prior art.

The Court: How can he avoid it if it is cited in the file wrapper itself. The court couldn't avoid looking at it as part of the prior art if it's cited in the file wrapper.

Mr. Subkow: But the point is, is it material? Perhaps it was incorrectly cited.

The Court: I don't know whether it is material or not. It's claimed to be a part of the prior art. I haven't seen the patent myself.

Mr. Subkow: I want to protect the record. I don't want [194] evidence to go into the record and then have a request for a modification of the order or an amendment of the complaint to permit them to plead based upon the evidence that has been introduced.

The Court: Is there any such thought in the minds of the defendants?

Mr. Kenway: Absolutely not, your Honor.

The Court: Well, there is a disclaimer as to that. So, let's proceed. The objection is overruled.

(Testimony of Cleon James Moon.)

Mr. Kenway: Would you please read the question again, Mr. Reporter?

(Question read.)

The Witness: Yes, there is a material difference.

Mr. Kenway: I have the first drawing in that patent, your Honor. I don't have an extra copy of it. I am sorry. I thought I had.

The Court: This is the McEwen patent.

Mr. Kenway: Yes. Just to give you the general idea of what he is talking about.

The Court: Is there any objection to the court using this?

Mr. Subkow: Not at all, your Honor.

The Court: Very well.

Mr. Subkow: Would your Honor like to use the patent itself? I have it here. [195]

The Court: No. I think it might be of more use to you.

Q. (By Mr. Kenway): In what respects is it different?

A. The Exhibit 95 shows a back guy that influences the loading condition of the tower, as I explained in my testimony. The McEwen patent shows nothing at all.

Q. Assuming, now, that you have here in the McEwen patent the same guys that you show in Exhibit 95, the same height of the mast, the same angle of the mast and the same loads, would there be a difference in the factors and manner in which the load is applied through the derrick, the bracing structure, and so forth?

(Testimony of Cleon James Moon.)

A. If the guy is secured to the member 11, or at the base of it, or any place along that gooseneck, then there would be very little difference, if any, in the loading of the two masts.

Q. Again with reference to Exhibit 95, are you aware that Franks has manufactured telescoping derricks which could be detached from the truck and left erect at the well head so that the truck could be driven away?

A. May I ask if—well, strike that.

Yes, I am familiar with it.

Q. So that it isn't necessary for the operation of a portable derrick that it be at all times connected to the vehicle that carries it?

A. No, it isn't necessary. [196]

Q. Concerning the problem of legality in respect to the highway laws, would you say that that is a problem today? A. Very definitely.

Q. Would you also say that—well, let me ask it this way: Is it possible for a well service operator to buy on the market today either a back-in unit or a drive-in unit with a mast tall enough to let him pull doubles and with the vehicle that lets him add onto it all the accessory equipment he would normally like to have and still comply with the weight limitations in the vehicle code?

A. Well, that's a question of how much extra equipment you put on. You can buy extremely large legal back-ins capable of handling wells clear up to 14,000 feet on the market today from standard manufacturers which are completely legal. On

(Testimony of Cleon James Moon.)

the other hand, those back-ins can be overloaded with excess equipment and made illegal.

Q. And would you agree that quite often a manufacturer will deliver a unit to a customer which is quite legal and that the customer will add additional equipment which gets them into difficulty with the highway laws?

A. That has happened.

Q. Well, wouldn't you say that it is customary?

A. It's certainly not customary.

Q. You would say it happens only in rare instances? [197]

A. It happens at infrequent intervals.

Q. Now, with respect to the slidable derrick you were talking about, I call your particular attention to Exhibit 29, which is the photograph of the partially erected sliding derrick model——

The Witness: Excuse me. Can I speak to the clerk a minute?

That's yours.

Q. (By Mr. Kenway): Now, do you have Exhibit 29 in front of you? A. Yes.

Q. And that has been first slid forwardly along the chassis top and then tilted to the position in which we see it here, is that correct? A. Yes.

Q. Now, then, you spoke in your direct testimony of a fulcrum point, and I take it that's over the top of the cab, is that correct?

A. It's above the driver's position.

Q. And is that just a flat bar? I mean, what is

(Testimony of Cleon James Moon.)

now holding the derrick from sliding right down to the ground?

A. It is a round bar with a flat block on each end. And it is latched into place in that position.

Q. So that it can pivot but it can't slide, is that correct? [198]

A. It can pivot.

Q. But it can't slide?

A. It can't slide when it is locked, no. [199]

Q. Well,——

A. It is actually fulcrumed off the end of the cab.

Q. But you said there was no hinge there, I believe, and I ask you why your clamp and bearings, and so forth, wouldn't be considered a hinge.

A. There is a difference between a hinge and a fulcrum point. A hinge is a fixed arrangement. A fulcrum point is a point that can be anywhere. We slid this back and forth.

Q. Well, but, as you see it here, it can pivot only on that one place, and it is clamped together there, is it not?

Mr. Subkow: I submit counsel is arguing with the witness, your Honor.

Mr. Kenway: No, I am asking a question.

The Court: Do you understand the question?

The Witness: I didn't understand that it was posed as a question. Will it be re-read, please?

The Court: Suppose you reframe it, and ask him for the fact.

Q. (By Mr. Kenway): The derrick, as you see it here, namely, in Exhibit 29, is pivoting about

(Testimony of Cleon James Moon.)

that fulcrum point you mentioned. It is locked in that position, so that it can't pivot anywhere else, can it?

A. At this particular point, that is correct. [200]

Q. Now, again looking at Exhibit 29, and assuming that the erecting process has been carried to completion, would you say that the legs of the erected derrick will straddle the driver's position?

A. They are on each side of the driver's position.

Q. But you wouldn't use the word "straddle"?

A. In the sense that "straddle" to me means that you can see upward and between a frame that comes down to the ground, yes, I would use the word "straddle."

Q. You also testified, as I understood it, that when this unit was in the over-the-road position, the legs of the derrick straddled the driver's position; is that correct?

A. The patent so states that in column 4, line 18:

"The truck may be driven into the derrick site. It will be observed that the driver has full view of the site and can spot his truck accurately. It will be observed that no equipment associated with the truck is positioned in front of the driver. Particularly, as will be seen, the derrick legs straddle the cab, and the derrick, while it is being erected or retracted to rest position, does not obstruct the view of the operator of the cab."

Q. So that when a unit has been constructed as shown in your patent, the derrick legs always strad-

(Testimony of Cleon James Moon.)

dle the driver's position, whether the derrick is horizontal or inclined, or [201] completely erected; is that true?

A. In the sense that I previously mentioned, yes.

Q. And that is the sense conveyed by the sentences you read me from your patent?

A. That is correct.

Q. Now, with respect to the companies to which you have given licenses, Hopper, Ideco, and Wagner-Morehouse, is it true that they manufacture both drive-in and back-in types?

A. That is correct.

Q. So that you would agree with me that the drive-in type has become accepted, but that it hasn't pushed the back-in type off the map?

A. The back-in type is still being made, certainly.

Mr. Kenway: One moment, your Honor.

Mr. Subkow: May I offer the witness a drink of water, your Honor?

The Court: Yes, you may.

The Witness: Thank you, Mr. Subkow.

The Court: At any time you wish a drink, you may ask for it, and the bailiff will provide it.

The Witness: Thank you.

Q. (By Mr. Kenway): I direct your attention to Plaintiffs' Exhibit 47, the Hopper catalog for 1957 and 1958, and would you please turn to page 2363 and the Figure 6 at the top of the page. Would you say that, as shown in Figure [202] 6, the legs of the derrick straddle the driver's position?

(Testimony of Cleon James Moon.)

Mr. Subkow: Your Honor, I object that it is quite immaterial whether a structure of this type straddles the cab, or doesn't straddle it. It has no relationship to any issue in the case. The case is with regard to the patent in suit. The patent in suit does not relate to the back-in type, and this is a back-in type.

Furthermore, as to what the word "straddle" means as we have used it depends upon the interpretation of the word, and I think your Honor is able to interpret it.

The Court: He could have answered the question a long time ago, couldn't he? Then it would have saved us both some time. It is a matter of argument. "Straddle" is a very common word.

Mr. Subkow: There is going to be a lot of evidence brought in, or attempted to be brought in in place of your Honor's interpretation.

The Court: I don't doubt it. That is true in every one of these cases. But I can tell from looking at that that that derrick is not straddling the cab, so I don't see why you would have to waste a question on a subject like that, and you can argue it.

Mr. Subkow: I apologize. I withdraw the objection.

Mr. Kenway: And I withdraw the question.

The Court: Very well. Then you can start over again. [203]

Q. (By Mr. Kenway): You will agree, will you not, Mr. Moon, that your patent in suit does not show in the drawings any guys?

(Testimony of Cleon James Moon.)

A. That's right.

Mr. Subkow: I object, your Honor. I have a point here that I think is serious, and it is the same point I raised before. There is no issue in this case with regard to the completeness or the adequacy of the description. No defense has been raised with regard to the disclosure. Therefore, we must assume the disclosure is complete and satisfactory under the patent laws, as the issues are framed, and inquiry into that point for the purpose of testing the validity of the patent is outside the issues of this case. We are not prepared, and I put in no testimony on that.

The Court: This is cross examination, and I think we can get these questions answered quicker. Of course, I can see what is in the drawings myself, having had a day and a half on rather detailed education on that. I think I can see pretty well what is in the drawings, but counsel may wish to get something into the record on cross examination, as you did on direct, so I will permit it.

Mr. Subkow: Your Honor has ruled, so I accept it, but may I make this additional comment, and then I won't have to make it further in the examination. This evidence, which is introduced without objection, may be made the basis of a [204] motion to amend the complaint or the pretrial conference order, and I don't want to be met with that situation.

The Court: Counsel has disclaimed any such intention.

(Testimony of Cleon James Moon.)

Mr. Subkow: Will that apply to all such evidence put in outside the four issues framed at the pretrial? If that is the case, I won't have to rise to make the objection.

Mr. Kenway: Let me say at this time that I am pretty happy with the pretrial order and the issues as stated therein, and I am not going to ask this court to decide this case on any other than the issues as stated therein.

The Court: Does that answer your question?

Mr. Subkow: I will accept the stipulation.

Mr. Kenway: And I hope that I can perhaps continue with the examination.

The Court: Proceed, Mr. Kenway.

Q. (By Mr. Kenway): In your patent at column 2, beginning at line 26, you say:

"As a result of this arrangement, the reactive thrust and the static load imposed on opposite sides of the front axle are in balanced arrangement, thus imposing no tilting force about any of the axles of the truck."

You would agree, would you not, that that statement is also true of the construction shown in the McEwen patent?

A. Yes, that structure is true—that construction is [205] true of the McEwen patent, or, that statement is true.

Q. Now, do you recall that I took your deposition out here last year? A. That's right.

Q. And at page 10 of your deposition——

(Testimony of Cleon James Moon.)

Mr. Subkow: Just a second. May the deposition be placed before the witness?

The Court: Is it on file?

Mr. Kenway: Yes, it is on file.

The Court: Do you have it, Mr. Clerk?

Mr. Kenway: It is our Exhibit U.

The Court: Place it before the witness.

(The document referred to was handed to the witness.)

Mr. Subkow: May I ask what page that reference was?

Mr. Kenway: Page 10.

The Court: What portion do you wish the witness to read?

Mr. Kenway: Well, I don't think he needs to read from it. I just want——

The Court: I always permit the witness to read to himself the question and the answer, if you seek to impeach him, so that he may have an opportunity before the impeaching question is put to refresh his recollection as to what is being talked about.

Q. (By Mr. Kenway): I call your attention to the portion [206] at page 10 of your deposition, beginning at line 14 and ending at line 21. Would you read that over, please, to refresh your recollection.

A. (Examining document.) I have read it over.

Q. What you say there in your answer to my question is still your testimony today, is it not?

A. That is correct.

Mr. Subkow: Your Honor, may I call the atten-

(Testimony of Cleon James Moon.)

tion of counsel that the portions indicated do not complete the statement or the testimony, and give, I think, an entirely false impression, unless the further question is asked——

The Court: Mr. Subkow, the plaintiff, or, rather, this witness is a very intelligent witness. He can take care of himself on that. [207]

The Witness: I would like to continue in that respect. This applies——

Mr. Kenway: If you please, sir. Mr. Subkow can take care of that on redirect examination.

The Court: He may explain, if he wishes to.

Mr. Kenway: All right.

The Court: He may explain any answer he makes.

The Witness: This applies to an entirely different class of mast. It applies to a mast that is shorter, is thinner, and has much less capacity.

The Court: What is "this," now? What is it that you are speaking of?

The Witness: My explanation from line 16 to line 21 on page 10.

The Court: Don't you think it better be read into the record so the record will be intelligible at this juncture?

Mr. Kenway: Yes. Why don't you read your answer to that question?

The Court: Read the question and the answer.

Mr. Kenway: All right. My question was,

"Would you then tell us in your own words, please, what the invention was that you made?"

(Testimony of Cleon James Moon.)

And would you please read your answer?

The Witness: "A. The need for a drive-in type of unit using a large capacity portable derrick has [208] been known for quite a while. In fact, some of the early well-drilling hoists with pole masts were drive-in types of units. I wouldn't claim that the idea of the drive-in unit was original with me."

Now, the reason I wouldn't claim that it was original was because my type of unit and the early pole mast types of units were entirely different units. The arrangement of all the components, the supporting structure, the mast itself, were entirely different. And for that reason that statement was made.

Q. (By Mr. Kenway): Pole mast units are still being used today, are they not? A. Yes.

Q. And still being manufactured?

A. Yes.

Q. As a matter of fact, some of your licensees make pole mast units, do they not? A. Yes.

Q. Would you agree, Mr. Moon, that safety regulations of most operators provide that there be no one in the cab while the derrick is being erected or retracted?

A. I know of no such regulation.

Q. Do you regard it as a safety practice for someone to sit in the cab while the derrick is being erected or retracted? [209]

A. Well, no, I don't regard it as a safety practice. That is one reason we put the controls outside when we built our unit.

(Testimony of Cleon James Moon.)

But I explained in my testimony that at frequent times when an operator has not been satisfied with the spotting of his derrick, either in a drive-in type or a back-in type, he has gotten into the cab and has changed the original position of the mast with the mast up, and that I did not consider that he was nearly as safe in a back-in type as he was in a drive-in type.

Q. He is not particularly safe in either type, is he, if he does that?

A. Actually, he has a pretty good steel framework around him at a point where there would be less energy, less force in the drive-in type than there would in the back-in type.

Mr. Kenway: I will offer in evidence at this time the deposition of Mr. Moon as Defendants' Exhibit U.

Mr. Subkow: Does that include the exhibits that are attached to the exhibit?

Mr. Kenway: I will offer the exhibits separately.

The Court: The deposition, without exhibits, is received as Defendants' Exhibit U in evidence.

(The exhibit referred to, marked Defendants' Exhibit U, was received in evidence.)

Mr. Kenway: Mr. Clerk, would you find our Exhibit G, the photograph?

(Whereupon the exhibit was placed before the court.)

Mr. Kenway: I will hand my copy to the witness.

(Testimony of Cleon James Moon.)

(Whereupon the document was handed to the witness.)

Q. (By Mr. Kenway): Looking at Exhibit G, Mr. Moon, I have reference to your direct testimony that the forces about the forward axle were in balance.

Mr. Subkow: May we have the identification of that exhibit in the Moon deposition, counsel?

Mr. Kenway: The Moon deposition, Exhibit 7.

The Court: In other words, by that you mean that Defendants' Exhibit G for identification is the same exhibit that was referred to in the Moon deposition as Exhibit No. 7. Is that it?

Mr. Kenway: That is correct, your Honor.

The Witness: To what part of my deposition are you referring?

Mr. Kenway: I am not referring to the deposition. I am referring to the testimony you gave us earlier at this trial, particularly with reference to Figure 6 of the patent in suit.

The Witness: Yes.

Q. (By Mr. Kenway): You were explaining how the loads were transmitted to the ground, and so forth, and you explained, [211] as I recall it, the forces were in balance with respect to the front axle and the bracket 26, and so forth; and that you did not have excessive bending moment in the frame and the chassis.

Now, if I haven't recalled what you said accurately, please correct me. Is that substantially what you told us?

(Testimony of Cleon James Moon.)

The Court: Well, why don't you ask him a question? The record will show what he testified to.

Q. (By Mr. Kenway): Well, my question then is this, with respect to Exhibit G: Would you say that there had been excessive bending moment in the frame of the chassis adjacent the front wheel?

A. Yes. That is obvious.

Q. And that is a Waldrip unit shown in the photograph, is it not?

A. Yes, it appears to be.

Mr. Kenway: I will offer the photograph in evidence as Exhibit G.

The Court: The copy I have has some markings on it, 13, 14, 15, 16, 17, 18. I take it that those are made intelligible by defendants' exhibit U, the Moon deposition?

Mr. Kenway: Yes, your Honor.

The Court: Very well. Received in evidence.

(The exhibit referred to, marked Defendants' Exhibit G, was received in evidence.) [212]

Q. (By Mr. Kenway): Did you ever design any fire-fighting equipment, Mr. Moon?

A. No, sir, I never have.

Q. Would you think that over and make sure? Are you sure you didn't?

A. I vaguely recall a piece of airport fire-fighting equipment, a fog job that I did some of the drafting on. I couldn't say that I designed it.

Mr. Kenway: Your Honor, I have been trying to make this as brief as I could, and I think that I

(Testimony of Cleon James Moon.)

could shorten it even more if I could have a couple of minutes to go over my notes.

The Court: Yes. Take your time.

Mr. Kenway: No further questions, your Honor.

The Court: Any redirect?

Mr. Subkow: Just a few questions.

Redirect Examination

Q. (By Mr. Subkow): With regard to Exhibit 7 of the Moon deposition, Exhibit G, do you have any knowledge as to why that failure occurred?

A. No, I don't. There are many things that can cause a failure of that type.

Q. You have no knowledge of what caused this particular—— [213]

A. I do not know what caused this failure.

The Court: What are some of the things that would cause a failure of that type? A windstorm?

The Witness: Well, a windstorm could conceivably do it. But, your Honor, I have repaired vehicles and masts of this type, supervised their repair, of practically every make. One of the predominant reasons that an accident of this type occurs is due to air in the hydraulic system. That hydraulic ram, or set of rams that pushes the mast up is full of hydraulic fluid as the operation takes place.

Now, that mast might stand for several days. And packings are rather fallible things. They do not form a perfect seal around the ram. The ram gets corroded, or dirty, and causes the packing to

(Testimony of Cleon James Moon.)

leak to a certain extent. And as the weight of the fluid against the packing occurs, a little bit of the fluid leaks out.

Now, the crew has instructions to bleed the ram, to fill it back up again. And there's a way of doing that. If they forget and do not do it, the ram starts over center and falls against a cushion of air. Air is elastic. And it goes down until it hits the fluid column, at which time there is a terrific impact multiplying many times the normal bending moment, the normal force that would be applied against the frame. And that is one of the biggest reasons for failures of this type. [214]

The Court: The mast falls because the frame falls first, is that it?

The Witness: Because the hydraulic cylinder doesn't have any fluid in it to support the mast. The hydraulic cylinder has to be full of fluid. Air is not sufficiently strong. It is too elastic to support the mast, and the air compresses until it hits the remaining amount of fluid in the system, and then suddenly stops.

The Court: Do all of these things rely upon the hydraulic pressure from the ram to hold the mast up?

The Witness: Well, there are types of masts in use today that are raised by wirelines rather than by hydraulic systems.

The Court: I suppose the hydraulic system would be very satisfactory for raising it, but would be quite unsatisfactory for maintaining it there?

(Testimony of Cleon James Moon.)

The Witness: The hydraulic system is never any better than the maintenance that goes into it.

Q. (By Mr. Subkow): Clearing up a point, does the hydraulic cylinder hold the mast into erect position?

A. No. The mast, as it goes over-center leans against the back guys. That is one of the reasons that hydraulic cylinder loses its charge. It is standing there without any pressure in it. It leaks down.

The Court: The pressure is not on it? [215]

The Witness: The pressure is not on the ram during the well-pulling operation.

The Court: So the pressure put back on again, is that when the failure occurs?

The Witness: Yes, sir, that's right.

The Court: In lowering the mast?

The Witness: In lowering the mast.

Mr. Kenway: Could I ask a question there: With respect to Exhibit G, could there have been a frame failure due to the failure of the operators to extend the auxiliary jacks that support the frame back of the front wheels?

The Witness: Well, actually I don't believe so, because our calculated moment diagram indicated that we only had about a 10 per cent additional load if we did not put that support jack under the frame. Consequently, the factor of safety built into the frame, which is approximately 2, should have taken that 10 per cent overload without failure.

No. 16132

United States
Court of Appeals
for the Ninth Circuit

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW, Appellants,

vs.

CABOT SHOPS, INC., and HOWARD SUPPLY
COMPANY, Appellees.

CABOT SHOPS, INC., and HOWARD SUPPLY
COMPANY, Appellants,

vs.

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW, Appellees.

Transcript of Record

In Three Volumes

VOLUME II.

(Pages 321 to 636, inclusive)

Appeals from the United States District Court for the
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Court of Appeals
for the Ninth Circuit

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW, Appellants,

VS.

CABOT SHOPS, INC., and HOWARD SUPPLY
COMPANY, Appellees.

CABOT SHOPS, INC., and HOWARD SUPPLY
COMPANY, Appellants,

VS.

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW, Appellees.

Transcript of Record

In Three Volumes

VOLUME II.

(Pages 321 to 636, inclusive)

Appeals from the United States District Court for the
Southern District of California,
Central Division

(Testimony of Cleon James Moon.)

Mr. Kenway: But you are not stating definitely, as I understand it, that there could only have been a failure of the hydraulic system that caused the accident?

The Witness: There are many things which cause accidents in machines of this type.

The Court: Any further questions of Mr. Moon?

Mr. Subkow: Yes.

Q. In your examination with respect to Exhibit 33, [216] you were asked whether you considered that the positioning of the erecting mechanism inside the cab was a necessary part of your invention. Did you believe at the time that you——

The Court: There we are again. We are wasting more time by people trying to repeat what somebody said. That is what starts most of the arguments.

Mr. Kenway is on his feet to say he didn't ask him that. Aren't you?

Mr. Kenway: I don't recall saying that it was a necessary part.

The Court: It went to the question of whether it was desirable. Wasn't it?

Mr. Kenway: Yes.

Mr. Subkow: Then I misunderstood, and I withdraw the question. Then my notes are in error.

The Court: Are you ready to release Mr. Moon from the stand now?

Mr. Subkow: May I look at my notes, your Honor?

The Court: Yes.

(Testimony of Cleon James Moon.)

Q. (By Mr. Subkow): On the patent 2,331,558, the McEwen patent, do structures of that kind when erected have their guy extending from the top of the derrick connected to the gooseneck, or any part of the vehicle?

A. Generally not. It is conceivable that they could. [217] I would have to be completely honest about that. I believe I have seen some of the light type that had it secured to the gooseneck.

Q. You stated that certain back-in type units can be made legal. Can you state what kind of back-in type units can be built to be legal?

A. Yes. The McEwen type shown in this patent 2,331,558 can be made legal.

Q. With regard to Exhibit 29, I will ask one more question. The McEwen type is described as what kind of a unit?

A. It is a semi-trailer unit, and is an exceptionally difficult unit to handle, as anyone who has ever backed up a trailer knows. It also has the disadvantage of having a separate tractor and a separate engine in the equipment.

The engine 4 in the McEwen patent is the hoist engine. There is also an engine in 1, the truck-tractor vehicle. That means that you have a duplication of engines, one for running the hoist, and one for transportation purposes.

In the case of the semi-trailer design, you can make the unit legal, because we can take advantage of the extended wheelbase, and the law, which says that any combination of vehicles can reach out to

(Testimony of Cleon James Moon.)

60 feet. However, with wheelbases of that length, and the fact that it is a semi-trailer unit, [218] makes it extremely difficult to back into a well.

Q. With regard to Exhibit 29, that is the exhibit—— A. Maybe I can find it here.

Q. ——the Waldrip sliding type derrick unit, showing the erecting position? A. Yes.

Q. Had you moved the derrick only part way, that is, between the position shown in the exhibit and the position where it is usually when it is transported, would it have been possible at that position to fulcrum the derrick off the end of the truck? A. No, it would not.

Q. What would have interfered?

A. It was not secured at the fulcrum point when it was part way. We had only two latching points, one at the lower end of the mast, and one near the first girt, the first station point.

Q. And the security of the structure depended upon the proper functioning of those latches; is that correct?

A. Yes, that's right, and we had a near accident in bringing this design out. All of the units that had this type of design have all been changed over to the fixed type.

Mr. Subkow: That is all of my redirect.

The Court: Anything further of Mr. Moon?

Mr. Kenway: May I ask Mr. Subkow a question? You [219] remember Exhibit 96?

Mr. Subkow: Yes, sir.

(Testimony of Cleon James Moon.)

Mr. Kenway: Have you any other photographs of that?

Mr. Subkow: Yes, we have, and we will provide a series of photographs for you tonight on my way home. I have them up in my office. I am getting four copies of each of these.

We were going to use this particular photograph in connection with the examination on rebuttal. I have other photographs, and I will make them available to you.

Mr. Kenway: Does that show the front end,—some of the others?

Mr. Subkow: Yes, they show the front and they show other features. We will give you the whole group, and we may use them depending on the course of the trial. I don't know what is coming, you know.

The Court: You may step down, Mr. Moon.

(Witness excused.)

The Court: Anything further from the plaintiffs on the issue of validity?

Mr. Subkow: Yes, your Honor. We had organized the trial to start putting in the evidence of infringement at this point, and we were going to use the deposition of Mr. Woody, and some exhibits in connection with it. In view of the instructions that we would sever the issues, [220] last night I went through it, and I have some portions of the deposition of Mr. Woody which I would like to read into the record. It is only a small portion, and I know your Honor is impatient with that sort of thing,

but if I could have your indulgence, I would like to have your Honor hear that portion.

The Court: How much longer will it take to put on your entire case?

Mr. Subkow: Including infringement?

The Court: Yes.

Mr. Subkow: I had thought we could do it in about three days.

The Court: Three days for the plaintiff?

Mr. Subkow: Including the time I have spent. It might be another day.

The Court: This entire trial you gentlemen estimated would take four days, in its entirety.

Mr. Subkow: Six days, your Honor.

The Court: Then I must have written it down wrong. I don't know why it should take so long. I would say that you just make me sick of these devices when you keep on and on, and if I haven't learned it by now, I am hopeless. You will never get me to understand it if I don't understand it by now.

Mr. Subkow: I think you understand it. [221]

Well, all we can do is we can shorten it if we introduce the deposition as an exhibit, and rely on that. That would cut it. But then when we come to our witness to compare the structure, I wouldn't know whether your Honor would have that information before you.

The Court: Compare what structure?

Mr. Subkow: The infringing structure.

The Court: Can't we compare them? Is this so complicated that we have to have somebody sit

Mr. Subkow: On the issues of validity, it should not take very long.

The Court: Why can't you read into the record those portions that you wish to offer on the issue of validity, and then just offer the deposition as far as the issue of infringement is concerned, and then argue the matter?

Mr. Subkow: Yes.

The Court: Or probably you can argue from all of it.

Mr. Subkow: Yes, I am perfectly prepared to do so. I will introduce the whole thing as an exhibit, and argue from that. Yes, I am prepared to do that.

The Court: How long will it take the defendants, in the light of what we have said? [224]

Mr. Kenway: Well, allowing for reasonable cross examination, I would think I could be through in just about a day. Perhaps that is a little short. Perhaps it might go over a little.

Mr. Subkow: Your Honor, my statement assumes that I will be permitted on rebuttal to put my expert on to compare the structure.

The Court: Yes, if you feel you need him.

Mr. Subkow: Yes. [225]

The Court: But let's not use him until we need him, if that's agreeable.

Mr. Subkow: Yes. Let's wait to see.

The Court: Very well. We will resume then tomorrow morning at 9:30, if that is agreeable. The defendant will plead its evidence——

Mr. Subkow: May I ask the indulgence of the

court to make it 10:00 o'clock tomorrow? And I will be prepared to go another half hour in the evening. There are some matters that I want to take care of in the morning.

The Court: Very well. 10:00 o'clock.

If we don't conclude this—I have two other cases waiting, as you know, coming here tomorrow, and if we don't conclude this case by Friday evening, I don't know when we can take it up again. It might be a month or six weeks.

Mr. Subkow: Your Honor, we are in your hands there.

The Court: Well, let's boil it down into terms of finishing by early Friday afternoon.

Mr. Kenway: Do I understand that the plaintiff has rested its case?

The Court: He anticipates he will rest tomorrow noon on his entire case, as I understand it. Is that correct?

Mr. Subkow: Yes, I believe it is.

The Court: Very well. The trial will be recess until tomorrow morning at 10:00 o'clock. [226]

The court will adjourn.

(Whereupon, at 4:30 o'clock p.m. a recess was taken until 10:00 o'clock a.m. of the following day, Thursday, March 27, 1958.) [227]

Thursday, March 27, 1958. 10:00 a.m.

Mr. Kenway: Mr. Subkow has very kindly permitted me to put on a short witness, interrupting his presentation.

The Court: You may.

Mr. Kenway: Mr. Hopper, will you take the stand, please?

Mr. Subkow: May I be given a moment, your Honor?

The Court: Yes.

Mr. Lyon has handed me a list of defendants' exhibits. Do you wish to file a copy for the—does the clerk have a copy?

Mr. Clerk: I don't have one, sir.

The Court: Well, I tell you, we might bring these lists of exhibits up to date, and then at the close of the evidence each side file a copy with the clerk, and we will receive them as exhibits.

Mr. Subkow: That was my suggestion.

The Court: In that way we will have a complete list of all exhibits going into the record in case there is an appeal.

Mr. Subkow: In the presentation of the rest of my case may I then refer to these exhibits and give them a number with the understanding that the completed list will be the one that is referred to?

The Court: Yes.

Mr. Subkow: We have corrections to the record yesterday. [231] May we proceed as we did yesterday?

The Court: Yes, you may.

Are you ready to call your witness, Mr. Kenway?

Mr. Kenway: Yes, your Honor.

Would you please hand the witness Exhibit No. 47, the Hopper catalog?

The Court: The witness has not yet been sworn, has he?

Mr. Kenway: That's right, sir.

The Court: Will you swear the witness? [232]

FRANK A. HOPPER, JR.

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Frank Hopper, Jr.

The Clerk: Frank Hopper, Jr.?

The Witness: Frank A. Hopper, Jr.

The Clerk: Thank you, sir.

Direct Examination

Q. (By Mr. Kenway): Mr. Hopper, you are appearing here under subpoena, are you?

A. Yes.

Q. What is your occupation?

A. I am manager of shop operations for the Hopper Machine Works, Incorporated.

Q. And does that company manufacture the equipment shown in the catalog, Exhibit 47?

A. Yes.

Q. And the company is a licensee under the patent in suit, is it not?

A. Yes.

Q. I would like to ask you about the problem of legality of the well serving and drilling rigs, and ask [233] whether in the light of your experience you have greater problems with drive-in equipment or with back-in equipment?

(Testimony of Frank A. Hopper, Jr.)

A. No, I would say in general the problems are very similar.

Q. Would you say that the problem of legality of this type of equipment is one which has been satisfactorily solved?

A. No, that problem will be with us forever, as near as I can tell.

Q. Now, with respect to the height of the equipment above the road, do you have a greater problem when it comes to making a back-in unit or a drive-in unit?

A. No, the problems are identical, because in most cases the derrick configuration is similar on both types of construction.

Q. When it comes to the capacity of a drive-in or back-in unit to carry additional equipment, is one able to carry more additional weight than another?

A. Well, I am afraid that you would have to qualify that question slightly in this sense. The best way to answer it, I believe, is that the maximum gross which you can put on the highway is basically a functional wheelbase and the more a wheelbase you have to work with, the more weight you can put on the road legally, and, obviously, you have more wheelbase with a semi-trailer piece of equipment, [234] or, as you have termed it, the back-in type equipment.

Q. That is the back-in type?

A. Back-in, yes.

Mr. Kenway: All right. Your witness, Mr. Subkow.

(Testimony of Frank A. Hopper, Jr.)

Cross Examination

Q. (By Mr. Subkow): You referred in your last answer to a semi-trailer type of equipment. Is that shown in your catalog, Mr. Hopper?

A. Yes, I believe so.

Q. Will you tell us where it is to be found?

A. Here is one on page 2369, Figure 23.

Q. In making your answers to Mr. Kenway's questions with regard to the back-in unit, were you referring to this type of unit in your answers?

A. That is correct.

Mr. Subkow: That is all, your Honor.

The Court: Any further of Mr. Hopper?

Mr. Kenway: No, thank you.

The Court: You may step down.

Mr. Kenway: Will the court excuse this witness? He is under subpoena, and wants to go elsewhere.

The Court: He is excused.

Mr. Kenway: Thank you. [235]

(Witness excused.)

Mr. Subkow: I will try standing here for a little while, your Honor.

In view of your Honor's ruling on the order of proof, we have condensed or collapsed our case on the question of infringement, and will introduce the evidence, reserving for rebuttal other direct proof we may need to establish the issue of infringement.

At this point we will offer in evidence the pretrial conference order as Exhibit 101.

The Court: Received in evidence.

(The document referred to was marked Plaintiffs' Exhibit 101, and received in evidence.)

[See pages 57-73.]

Mr. Subkow: It is understood that that offer includes such portions of the plaintiffs' pretrial statement of facts as is referred to in the pretrial conference order?

The Court: Yes.

Mr. Subkow: We would like to introduce some answers to interrogatories by reference to the interrogatories, without reading them into the record, if that would be permitted.

The Court: It will be permitted unless there is any objection.

Mr. Kenway: No objection.

Mr. Subkow: In that case, there will have to be some clarification of some of the references in the answers, and I [236] will ask for stipulations with regard to these matters.

The Court: Have those interrogatories and the answers been marked as an exhibit?

Mr. Subkow: No, all of these interrogatories have been introduced into evidence by reading them into the record.

The Court: But now you wish to offer them without reading?

Mr. Subkow: Only specific answers to specific interrogatories, and not all the interrogatories.

The Court: Without reading?

Mr. Subkow: Well, I was trying to save time by doing it that way.

The Court: It is very desirable——

Mr. Subkow: Well, perhaps I had better read them.

The Court: Ordinarily I mark answers to interrogatories and responses to admissions as exhibits, so they will not be lost sight of in making up the record on appeal.

Mr. Subkow: I understand that, your Honor, but I am faced with the fact that some of these interrogatories contain self-serving statements, and I am afraid that if I offer them they might be binding on me as statements, and I am trying to avoid that consequence. I don't know what your ruling on that point would be, but I am just trying to preserve the procedural character of my presentation.

The Court: I would not hold them binding upon you. [237]

Mr. Subkow: Very well.

The Court: I don't know what the Court of Appeals might do.

Mr. Subkow: That was it.

The Court: Where something appears that is contrary to the truth, I do not find courts are disposed, just because some witness said something adverse to the person who called them, to follow that old rule any more.

Mr. Subkow: That seems to be the rule in Massachusetts. Perhaps Mr. Kenway can clear it up for us.

Mr. Kenway: In the interests of saving time, I am willing to state that we will not claim that our

answers to the interrogatories do bind the plaintiffs.

Mr. Subkow: But do bind the defendants?

Mr. Kenway: Well, I think that goes without saying.

Mr. Subkow: Then I will just offer the answers to the interrogatories in toto.

The Court: How many documents are there?

Mr. Subkow: There are two answers; one filed on February 21st, and one filed on March 20th, I believe.

The Court: The answers contain, of course, the interrogatories, under our rules, counsel?

Mr. Subkow: Yes, they do. There are also some answers, or, there is also a stipulation by the parties with regard to the adoption of the answers of the defendant Cabot Shops, [238] Inc.

Mr. Lyon: You mean by Howard?

Mr. Subkow: The adoption by Howard of the answers. That stipulation was dated when?

Mr. Lyon: March 12th. [239]

Mr. Subkow: And I would like to offer that stipulation, as well as the answers to the interrogatories.

The Court: March 12th?

Mr. Lyon: It was handed up just the other day.

There is also the answers of Howard Supply to certain interrogatories.

The Court: Filed March 31st.

Mr. Lyon: Right.

The Court: Now, the defendant Cabot Shops' answer is filed February 21st? Is that the one?

Mr. Subkow: Wait a minute. I am not offering

those answers. Are you offering the answers of Howard?

Mr. Lyon: The judge is asking you about defendant Cabot Shops' answers filed March 21st.

The Court: February 21st.

Mr. Lyon: March 21st, if your Honor pleases.

The Court: I am speaking about the earlier ones. It just so happens that the earlier answers were filed February 21st.

Mr. Lyon: I think Mr. Subkow is offering them both.

The Court: I am taking them one at a time, gentlemen.

Mr. Subkow: May I make my offer myself, your Honor?

The Court: Yes. But you have already made your offer as I understood it.

Mr. Subkow: That's right. [240]

The Court: The first offer is the answers filed February 21st.

Mr. Subkow: That's right.

The Court: That will be Exhibit No. 102 in evidence.

(The exhibit referred to, marked Plaintiffs' Exhibit 102, was received in evidence.) [241]

[See pages 11-27.]

* * * * *

The Court: The next offer is of the answers of the Cabot Shops, the defendants' further answers, being answers of defendant Cabot Shops filed March 21st. That will be received in evidence as Exhibit No. 103.

(The Exhibit referred to, marked Plaintiffs' Exhibit 103, was received in evidence.) [242]

[See pages 80-86.]

The Court: Then there is a stipulation, you say, with respect to the answers of defendant Howard Supply Company. Is that correct?

I don't see it in my file.

Mr. Subkow: It's the stipulation I signed here the other day. I don't know where March 12th comes from.

Oh, it bears the date of March 12th. I see.

The Court: Mr. Clerk, do you have it?

Mr. Lyon: I handed it to your Honor yesterday just after the noon recess.

The Court: The clerk probably has it.

The Clerk: I have the original.

The Court: Where is the extra copy?

The Clerk: I believe I sent it into your office.

The Court: When was it filed?

Mr. Lyon: Yesterday, sir.

The Court: Filed March——

The Clerk: Yesterday was March 26th.

The Court: ——March 26th.

It will be received as Exhibit No. 104.

(The exhibit referred to, marked Plaintiffs' Exhibit 104, was received in evidence.) [242-H]

[See pages 86-87.]

The Court: Is there an order made on the stipulation?

Mr. Lyon: We handed it up. I don't know whether your Honor signed it or not.

The Clerk: It was signed.

The Court: Very well. The stipulation and the order.

Now, do you wish to offer the answer of defendant Howard Supply Company filed March 21, 1958?

Mr. Subkow: No, I do not.

The Court: Very well. That's what you had in mind.

Mr. Lyon: If the court please, if you file this stipulation, as you have already ordered it received the stipulation states that the Howard Supply Company adopts as its answers to interrogatories, which it hasn't answered in that other paper, and the stipulation is unintelligible unless the answers that it hasn't filed——

The Court: Well, you can offer them.

Mr. Lyon: Well, at this time then I will offer the answers of Howard Supply.

Mr. Subkow: I will object that they were self-serving statements and not admissible.

The Court: Well, how is your record intelligible then?

Mr. Subkow: Because the answers of the Cabot Shops are in the record.

I am perfectly willing that they go in for purposes of identification but I am not offering them at all. [242-J]

The Court: Very well. Let them be received for that limited purpose.

Mr. Lyon: Thank you, your Honor.

The Court: Answers of defendant Howard Supply Company filed March 21, 1958 will be received as Plaintiffs' Exhibit No. 105 for the purposes of

identifying the answers referred to in Exhibit No. 104.

(The exhibit referred to, marked Plaintiffs' Exhibit 105, was received in evidence.) [242-K]
[See pages 75-79.]

Mr. Subkow: There are certain statements in the pretrial conference order in which there appear references to earlier portions which become unintelligible without them, and I am asking for stipulations to identify them.

In the pretrial statement of fact 50-B, which is admitted in the pretrial conference order, there is a reference to a brochure. [243]

May I have a stipulation that that brochure is Exhibit No. 22 in evidence?

Mr. Kenway: No. That is Exhibit H.

Mr. Subkow: It is also Exhibit No. 22.

Mr. Kenway: It was withdrawn as No. 22.

The Court: The defendants offered it as Defendants' H, with your permission.

Mr. Subkow: I am getting forgetful, your Honor.

The Court: Well, there are quite a few documents to remember here.

Mr. Subkow: Well, let's mark it H as long as it is identified.

The Court: It is received in evidence as H, is it not, Mr. Clerk?

The Clerk: That is correct. And No. 22 was withdrawn.

The Court: The Waldrip brochure. I marked it on your exhibit list as Exhibit H.

Mr. Subkow: I am sorry. I forgot.

In the answer to Interrogatory No. 14, served February 21, 1958, may we have the stipulation that Exhibit H therein referred to is the same Exhibit H?

Mr. Kenway: Agreed.

Mr. Subkow: The answer to Interrogatory No. 13, served March 20, 1958, in the last sentence may it be stipulated that Mr. Cory at the time referred to was the salesmanager [244] of the Frank's Manufacturing Corporation?

Mr. Kenway: On what date?

Mr. Subkow: The date referred to in the answer to the interrogatories. The answer to Interrogatory 13 served on March 30, 1958.

The Court: Can you give us the date referred to?

Mr. Subkow: No date is referred to, your Honor.

Mr. Lyon: 1951 is referred to.

Mr. Subkow: A period of time.

Mr. Kenway: He was in 1951. He no longer is, as I understand it. As of the middle of September last year, 1957.

Mr. Subkow: He was the salesmanager during all that period.

The Court: What is your stipulation, gentlemen? That he was during the time in question the salesmanager and continued to be salesmanager until the year 1957? Is that your stipulation?

Mr. Kenway: That is agreeable.

Mr. Subkow: In the answer to the Interrogatory No. 15 served February 21, 1958, and also the answer to the same interrogatory served March 20,

1958, may it be stipulated that the Waldrip wildcat there referred to is Exhibit 41?

Mr. Kenway: Yes, that is correct.

Mr. Subkow: The Woody deposition is a bound volume [245] containing two depositions bound together in one volume. The first deposition is one given on notice by the plaintiffs and contains pages 1 to 185.

We offer that deposition as Exhibit No. 98.

The Court: Any objection?

Mr. Kenway: No objection.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiffs' Exhibit No. 98, was received in evidence.)

[See page 511.]

Mr. Subkow: We have two lists of exhibits, our exhibit list and a list of the Woody deposition correlated to the trial exhibits.

I would like to offer the exhibit list as Exhibit No. 99, subject to a completion and correction according to your Honor's suggestion.

The Court: It will be received in evidence as Exhibit 99.

(The exhibit referred to, marked Plaintiffs' Exhibit 99, was received in evidence.)

The Court: That is the list two pages headed "Woody Deposition Exhibits" in one column and "Trial Exhibits" in another?

Mr. Subkow: I was referring to our trial exhibit list, the large one.

The Court: The trial exhibit list itself will [246] be Exhibit No. 99.

Mr. Subkow: Now, that is offered without offering the captions of the exhibit as having any particular meaning.

The Court: Only for the purpose of identification.

Mr. Subkow: Yes, your Honor.

And I will now offer the Woody exhibit list as Exhibit No. 100. The one that is—there is one column “Woody”——

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiffs’ Exhibit 100, was received in evidence.)

Mr. Kenway: I beg your pardon. Did you say Exhibit No. 100? We already have an exhibit 100. That is the pretrial—no, that was 101. I beg your pardon, your Honor.

Mr. Subkow: Now, I would like to make a bulk offer of all of the Woody exhibits listed in the Woody exhibit list, Exhibit No. 100, without separate identification and——

The Court: Are they attached? Have you offered the deposition?

Mr. Subkow: Yes, sir.

The Court: Of which they are a part?

Mr. Subkow: Yes.

The Court: What exhibit number is that?

Mr. Subkow: That was Exhibit No. 98.

The Court: Exhibit No. 98. And these Woody deposition exhibits now offered as exhibits to the deposition, [247] Exhibit No. 98, are they?

Mr. Subkow: Yes, sir.

The Court: Any objection to the offer?

Mr. Kenway: No, your Honor.

The Court: Very well. They will be received in evidence and will be identified in this record as sub-exhibits of Exhibit 98.

Mr. Subkow: And they are all identified in No. 98.

The Court: Yes. They will bear the same identification in this record as they bear in Exhibit 98, being sub-numbers of Exhibit 98.

Mr. Subkow: They are all given numbers in 98, and you will find each exhibit on one list identified in the other list.

For example, if you will take Exhibit 1 of the Woody list and turn to Exhibit 54 of the main list, Exhibit 99, you will find that it is identified as the 1956 Cabot catalog.

The Court: Well, do you wish the Woody deposition exhibits to be given trial exhibits here and appear independent of the deposition?

Mr. Subkow: Yes, sir. And that is the way that we have organized this exhibit and, therefore, there will be no confusion.

The Court: Then they will be given the [248] numbers 54 to 91, inclusive, as appears on Exhibit 100?

Mr. Subkow: Your Honor, they are not sequential. They have the corresponding numbers given. For example, you will see——

The Court: I just assumed it was sequential.

In other words, you will give them the trial exhibits as they appear under the trial exhibit column in Exhibit 100.

Mr. Subkow: That's' right. That simplifies it.

The Court: Do you have it, Mr. Clerk?

The Clerk: I have it.

The Court: Do you understand it?

The Clerk: Yes, I do.

The Court: Very well.

Mr. Subkow: It's sort of a concordance, you see.

The Court: Yes. It will be very helpful.

Mr. Subkow: Otherwise it would be utter confusion, because the exhibits are otherwise identified in the deposition itself. [249]

(The exhibits referred to, marked Plaintiffs' Exhibits 54, 55, 56, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 78, 79, 80, 81, 82, 83, 84, 85, 41, 10, 86, 11, 87, 88, 12, 14, 15, 89, 90 and 91, were received in evidence.)

[See Exhibits 10, 11, 12, 84 and 91 in Book of Exhibits.]

Mr. Subkow: Now, we have some additional exhibits we would like to introduce in evidence. We have a photograph which I have given to the defendants yesterday——

The Court: Before you go ahead, what is Exhibit 99?

Mr. Subkow: Exhibit 99 is the exhibit list itself.

The Court: Thank you.

And Exhibit 97?

Mr. Subkow: Exhibit 97 I am now offering.

The Court: Well, it's a small wonder I couldn't find it.

Mr. Subkow: I am referring this as a photograph of a detail showing the point at the juncture of the

rear leg of a Franks clipper unit and the outrigger.

May it be received in evidence without further foundation?

The Court: The photograph is received as Exhibit No. 97.

I understand it is stipulated that it fairly depicts what Mr. Subkow so stated it did.

Mr. Kenway: Yes, sir.

(The exhibit referred to marked Plaintiffs' Exhibit 97, was received in evidence.)

[See Book of Exhibits.]

Mr. Subkow: May I have Exhibits 40, 42, 43, 44, 45 and 46?

I believe they are—42 is the Waldrip 1948 catalog. [250] 43 is the 1949 catalog, which the clerk should have. Have you got it?

That is Exhibit 43. Does the clerk have copies of them? [251]

Mr. Subkow: Yes. Have you got Exhibit 42? I will give it to you, and you may be able to find it later.

Have you Exhibit 41?

The Clerk: Not right here in this group.

Mr. Subkow: I will give you an extra copy of it.

I will offer these Exhibits 40, 41, 42, and 43 in evidence, as they are identified in the exhibit list 99.

May they be received without further foundation as being a fair representation of what they state?

Mr. Kenway: Yes.

The Court: Let me get that offer again. Which exhibits?

Mr. Subkow: 40, 41, 42 and 43.

The Court: Received in evidence.

(The documents referred to were marked Plaintiffs' Exhibits 40, 41, 42 and 43, and received in evidence.)

Mr. Subkow: May I also have a stipulation that the Exhibit 41, the Waldrip Wildcatter is the Waldrip Wildcatter referred to in the Woody deposition as Exhibit——

The Court: On your exhibit list it is listed in the column as Woody Former Deposition Exhibit 35?

Mr. Subkow: That answers my problem.

The Court: Yes, or Moon deposition 9?

Mr. Subkow: That is right.

The Court: Is it stipulated that is one and the same [252] items?

Mr. Kenway: Yes.

The Court: The Waldrip Wildcatter?

Mr. Kenway: Yes, sir.

Mr. Subkow: Now, I next offer Exhibits 44, 45 and 46, being the certified copies of the Moon patent 2,662,797, 2,565,777, and the Moon application serial No. 10412.

The Court: Any objection?

Mr. Kenway: No, your Honor.

The Court: Received in evidence.

(The documents referred to were marked Plaintiffs' Exhibits 44, 45 and 46, and received in evidence.)

[See Exhibits 44 and 45 in Book of Exhibits.]

Mr. Subkow: That was 44, 45 and 46.

The Court: Yes.

Mr. Subkow: Now, in the Woody exhibit list there are some very large drawings, and in order to make it possible to study them with some comfort, we had them reduced in size by photographs. We have them on our list as Exhibit 57, which is a reduction of the Franks' Exhibit 56; Exhibit 59, which is a reduction of Exhibit 58; Exhibit 75, which is a reduction of Exhibit 74, and Exhibit 77, which is a reduction of Exhibit 76.

The Court: The exhibits themselves of which those are reproductions have already been received?

Mr. Subkow: Yes, sir. [253]

The Court: Any objection to the reproductions?

Mr. Kenway: No objection, subject to correction if errors are found.

Mr. Subkow: Of course.

The Court: Exhibits 57, 59, 75 and 77 are now received in evidence.

(The documents referred to were marked Plaintiffs' Exhibits 57, 59, 75 and 77, and received in evidence.)

[See Exhibit 59 in Book of Exhibits.]

Mr. Subkow: Your Honor, I apologize, but you did say 57 and 59?

The Court: 57, 59, 75 and 77 are the reductions?

Mr. Subkow: Thank you, yes, sir.

With respect to Exhibit 92—let's have Exhibit 92.

I would like to offer in evidence Exhibit 92. It bears at the bottom a statement, "Oil and Gas Journal, July 29, 1957," which was placed on this, I believe, by Mr. Moon.

Mr. Lyon: May we see it, please?

(The document was handed to counsel.)

Mr. Subkow: We have an extra copy for you.

Mr. Kenway: No objection.

The Court: Any objection to Exhibit 92?

Mr. Kenway: No objection, your Honor.

The Court: Received in evidence. [254]

(The document referred to was marked Plaintiffs' Exhibit 92, and received in evidence.)

The Court: Has Exhibit 93 been received yet, that large drawing?

Mr. Subkow: No, it has not been received. Exhibits 94 and 95 were offered for the limited purpose, and I would like now to make a general offer of these Exhibits 94 and 95.

The Court: For all purposes?

Mr. Subkow: For all purposes.

Mr. Kenway: That is Exhibits 94 and 95?

Mr. Subkow: Yes.

Mr. Kenway: We object, if they are offered as illustrating the units actually constructed by the defendants. We have no objection to them to explain the testimony that Mr. Moon gave about loads, and so forth, in other words, as demonstrating what they are as to the derricks themselves.

Mr. Subkow: Your Honor, that has been the difficulty in not being able to present the evidence.

The Court: Well, how do you expect to lay the foundation on the issue of infringement?

Mr. Subkow: That was my problem. That is why I wanted to put it in full, but your Honor suggested

I merely present the evidence and meet that on rebuttal, and that is the way I am proceeding.

The Court: There is no foundation to show that it [255] depicts the accused device, is there?

Mr. Subkow: Of course not.

The Court: —except for the mast itself?

Mr. Subkow: Of course not.

The Court: Now, do you have a witness that you wish to swear and have him say so?

Mr. Subkow: Yes.

The Court: That will not take but a minute, and then you will meet the objection.

Mr. Subkow: I wanted to support it by the supporting evidence which would now come forward.

The Court: If they deny it, you could meet it on rebuttal.

Mr. Subkow: May we ask whether the denial, or, to what feature the objection extends, and maybe on the rebuttal we could address ourselves to that point, and that would be satisfactory.

The Court: Wherein is the accused device not fairly depicted on Exhibits 94 and 95?

Mr. Kenway: If I may say, your Honor,—

The Court: Yes.

Mr. Kenway: There is shown here—

The Court: You are referring now to Exhibit—

Mr. Kenway: Exhibit 95. There are two things. It shows the cab extending forwardly into the area circumscribed [256] by the wedge of the derrick.

Mr. Subkow: Is that this small angular section right here that you are referring to (indicating)?

Mr. Kenway: Yes.

The Court: Can it be stipulated that on the defendants' device the front end of the cab does not protrude under any portion of the mast when erected?

Mr. Subkow: I believe the evidence in the Woody deposition——

The Court: Is that the problem?

Mr. Kenway: That is the problem.

Mr. Subkow: I think the evidence in the Woody deposition shows that it does to that extent.

Mr. Kenway: We claim that it does not.

The Court: Is that going to be material?

Mr. Subkow: I don't think it will be too material. I don't think it is material whether a little tip of a thing sticks in there or not.

The Court: Then why don't you stipulate that it does not protrude that far?

Mr. Subkow: I will be willing to.

The Court: I can't conceive that that will be a determinative factor in any infringement.

Mr. Subkow: It certainly would be a de minimis matter, if anything. [257]

Mr. Kenway: I am sorry I can't agree with that, your Honor. This is a case of file wrapper estoppel. I don't want to argue something that is out of place, and I will state our purpose, if it would be helpful at this time.

The Court: Of course, I don't want to lead either side into a stipulation, and I would relieve you of it if it did later become material.

Mr. Kenway: It seems to be a most peculiar

thing to quibble about, but, frankly, I think the claims——

The Court: Then the only time it could be material, I take it, is if it protruded far enough that the person sitting in the driver's position, or sitting in the cab, at least, could look up inside of the mast.

Mr. Subkow: Assuming there was some transparency through which you could look.

Mr. Kenway: If Mr. Subkow would accept that as a statement——

Mr. Subkow: Let us do this——

The Court: Won't you stipulate it does not protrude far enough into the mast to enable the driver to look up inside the mast?

Mr. Subkow: I don't know. I would have to ask. I would say this: Let it go in subject to proof on that point, and we will solve the problem of whether it sticks a quarter of an inch into the thing, and whether it is [258] significant, later on.

The Court: As now drawn, it would be my feeling, unless I was convinced to the contrary, and I should say that you could not see at all up there. That is the way it looks to me, unless you could see through some windows up in the top of the cab.

Mr. Subkow: That is right. May I ask my people about that?

The Court: Yes. [259]

Mr. Subkow: My advisor tells me you can't see through solid steel.

The Court: That's a sound observation.

Does that mean you stipulate?

Mr. Subkow: Yes.

The Court: Is there any objection—oh, you have another item.

Mr. Kenway: Just one more thing, and I don't think that there will be any difficulty here.

Mr. Subkow: Just a second. I am further advised.

If your Honor will turn to Exhibit No. 55 and to page 1810——

Mr. Kenway: That is our equipment. There is no question about that.

Mr. Subkow: The exhibit was prepared with that in mind. I think that you will find that the cab extends at least as far as we have depicted it and that the exhibit is a fair representation.

The Court: Well, even here——

Mr. Subkow: You can't see up here.

The Court: ——the cab wouldn't extend into the mast itself.

Mr. Subkow: No, exactly. The question is whether we made a fair representation of it on that exhibit and whether the exhibit may be admitted in evidence as being fair [260] representation.

The Court: Well, is it intended that the front end of the cab merely abuts——

Mr. Subkow: Just as it is shown there, your Honor.

Mr. Kenway: You are not relying on this drawing to show infringement, are you?

Mr. Subkow: Oh, no.

Mr. Kenway: What difference does it make?

The Court: Well, we are certainly wasting a great deal of time.

Mr. Kenway: Why offer it as showing our equipment?

Mr. Subkow: Because it is a piece of demonstrative evidence that might help his Honor consider the case. I don't know. We thought it did when we prepared it.

The Court: What went in yesterday, yes, with respect to the analysis of the forces involved with respect to the mast, and the truck itself.

Mr. Kenway: I thought so, too. And I have no objection to that exhibit on that basis.

The Court: Is it offered for any other purpose than to show——

Mr. Subkow: Yes. It is offered to show the relationship of the parts.

Here is another point which we will offer. There are two points illustrated in the Woody [261] deposition——

The Court: Well, why don't you put someone on the stand who says that they have examined the defendants' equipment and they correctly show it. And then I will receive it, and the defendant can meet it.

Mr. Subkow: I ask Mr. Wagner to take the stand.

EDMOND M. WAGNER

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Edmond M. Wagner.

The Clerk: Edmond?

The Witness: E-d-m-o-n-d, M. W-a-g-n-e-r.

Direct Examination

Q. (By Mr. Subkow): I show you Exhibits 94 and 95, and an exhibit which has not yet been marked, and which I will ask the clerk to mark as Exhibit No. 93.

Mr. Subkow: I think that is right, isn't it?

The Court: A large drawing of Exhibit No. 56 showing derrick erected?

Mr. Subkow: Yes.

The Court: Mark it Exhibit No. 93, Mr. Clerk.

(The exhibit referred to was marked Plaintiffs' Exhibit 93 for identification.) [262]

Mr. Subkow: There are some unmounted copies of this that we can supply.

The Court: You have seen Exhibits 93, 94 and 95 before, have you?

The Witness: Yes, I have.

The Court: Did you prepare them?

The Witness: They were prepared under my supervision by a draftsman.

The Court: Did you ever see the defendants' equipment?

The Witness: I have seen the defendants' equipment.

(Testimony of Edmond M. Wagner.)

The Court: Do these exhibits 93, 94 and 95 purport to depict anything with respect to any of the defendants' equipment you have seen?

The Witness: They represent some types of the equipment that I have seen in California.

The Court: What types?

The Witness: Their drive-in type equipment at Terminal Drilling, for instance.

The Court: Any particular model?

The Witness: I don't know what the model numbers are designated.

Perhaps Mr. Woody could tell me the model of the Terminal Drilling.

The Court: The defendants' equipment at Terminal Drilling? [263]

The Witness: Terminal Drilling Company.

Mr. Woody: Well, Terminal Drilling has what is labeled in the '57 catalog on page 1885 as "Senior Clipper."

The Court: "Senior Clipper"?

Mr. Woody: That's right.

The Court: Is it agreed that the witness is referring to the defendants' "Senior Clipper" model?

Mr. Kenway: Yes.

Mr. Subkow: May I ask a question, your Honor?

The Court: Yes. I didn't mean to take over.

Mr. Subkow: Not at all. I think you have done very well.

Q. (By Mr. Subkow): In preparing these exhibits did you also use any of the exhibits that were offered in the Woody deposition?

(Testimony of Edmond M. Wagner.)

A. Yes. These exhibits were prepared from exhibits in the Woody deposition.

Mr. Subkow: In a moment we will identify them.

Q. (By Mr. Subkow): Are those exhibits the reduced drawings to which we have just referred, Exhibits 57, 59, 75 and 77?

Do you wish to see them?

A. I would like to identify them with the exhibits.

(Whereupon the exhibits were given to the witness.)

The Court: Do you have those exhibits before you now, [264] Mr. Wagner?

The Witness: Yes, I do.

The Court: Were these drawings, Exhibits 93, 94 and 95 prepared from those exhibits?

The Witness: They were.

Mr. Subkow: I have a further identification to make, your Honor, before asking that question.

Q. (By Mr. Subkow): Did you also employ any of the photographs shown in the trial exhibits 54 and 55?

A. They were used as references to clarify some details.

Q. Did you use this exhibit, Exhibit No. 97, or the features shown on the Terminal rig, from which this photograph was taken, in your thought or——

A. Yes. That photograph was used to clarify certain supporting elements in the drawing.

Q. In what exhibit?

A. Exhibit 95.

Q. Mr. Wagner,——

(Testimony of Edmond M. Wagner.)

Mr. Subkow: Do I need to qualify him to make this comparison? Is that admitted, or do I have to qualify him?

Mr. Kenway: I don't think I have any objection, but frankly——

The Court: Anything further?

Mr. Subkow: Then I was going to ask him the question [265] your Honor asked him, whether or not these drawings, 94, 95, and 93 fairly depict the structure as shown, as you saw it, and as it was revealed by these exhibits, Woody exhibits, to which you referred.

The Court: Exhibits 57, 59, 75 and 77.

The Witness: They do so——

Mr. Subkow: And Exhibits 1 and 2.

The Witness: They do so represent. 59 is related to 95.

The Court: Exhibits 1 and 2?

Mr. Subkow: Of the Woody deposition, Exhibits 54 and 55.

The Witness: Exhibit 57 is related to the one on the left there. What is the exhibit number there?

Mr. Lyon: 93.

Mr. Subkow: 93.

The Witness: And 75 and 77 are related to 94.

Q. (By Mr. Subkow): May I ask whether in presenting these exhibits that it was intended that this Exhibit 94 should show the planned view of the outrigger section, that is, the extended leg portions which are used in both Exhibits 93 and 95?

In other words, did we avoid a duplication of

(Testimony of Edmond M. Wagner.)

Exhibits by not making a similar one to correspond to 95?

A. Yes. In 93, the outriggers in 93 and 95 are quite similar in construction, so we made only one view [266] illustrating exactly the ones in 93.

Mr. Subkow: May they be received in evidence?

The Court: Any objection, now?

Mr. Kenway: No objection, your Honor.

The Court: Received in evidence. Exhibits 93, 94 and 95. 94 and 95 are now received for all purposes, having heretofore been received for a limited purpose. And 93 is received for all purposes.

(The exhibits referred to, marked Plaintiffs' Exhibits 93, 94 and 95, were received in evidence.)

Mr. Subkow: We have extra copies of some of this which I would be glad to give to opposing counsel. I think this is one you had.

Mr. Kenway: We have that.

Mr. Lyon: We have a 95. We have no 93.

Mr. Subkow: We will look, and if we find them we will supply them to you.

The Court: Any further questions of Mr. Wagner?

Mr. Subkow: Well, not at this point.

The Court: Any cross examination at this time?

Mr. Kenway: No, your Honor.

Mr. Subkow: May we reserve the right to call him on another point for another purpose?

The Court: Yes.

You may step down, Mr. Wagner. [267]

(Witness excused.)

Mr. Subkow: I wonder if we could take a short recess so I can collect my thoughts?

The Court: Yes.

(Short recess.)

Mr. Subkow: Your Honor, we took the liberty of glancing through your list of exhibits. We find that one of the exhibits is unchecked by you, and that is one of the exhibits that went in with the bulk offer with the Woody exhibits.

The Court: Which exhibit is that?

Mr. Subkow: Mr. Clerk, do you remember what it is? It's 24, or something. It's unchecked along your list.

The Court: I have Exhibit 24 checked.

Mr. Subkow: I don't remember the number.

The Court: I hadn't checked the Waldrip brochure which was on your list as trial exhibit 22, but it was received as Defendants' Exhibit H.

Mr. Subkow: We just want to make sure that all of these exhibits are in.

The Court: That's according to my check. But what I check doesn't count. What the clerk checks is what counts.

Does the clerk show that all exhibits are in? [268]

The Clerk: My list shows they are in.

Mr. Subkow: If we find we are in error, we can make an offer.

The Court: Very well. If you need to reopen, you may reopen for that purpose.

Mr. Subkow: Thank you, your Honor. In that case we will rest our case. [269]

Mr. Kenway: May I make a brief opening statement, your Honor?

The Court: You may.

Mr. Kenway: The purpose of my statement is, primarily, to boil down the issues, and I will speak first of infringement.

We had intended to put on two witnesses on that subject, but these devices are boring me as much as they have your Honor, and I propose not to do that, and go ahead on the assumption that we can file briefs based on the exhibits, and argue the matter of infringement on that basis.

The Court: I didn't want to suggest that this was not an interesting case to me,—

Mr. Kenway: No.

The Court: —but you can get bogged down into details sometimes where it becomes very tiring.

Mr. Kenway: I find it so. Then I would like to say that our position on infringement has to do with the file wrapper. It is a rather bulky file wrapper, and I am referring to Exhibit T, and I thought if your Honor had no objection, I would simply like to indicate two parts of that file wrapper which I believe are significant.

The Court: Has it been received yet?

Mr. Kenway: No, your Honor.

The Court: Do you offer it? [270]

Mr. Kenway: I offer it in evidence.

The Court: Any objection?

Mr. Subkow: No objection.

The Court: Exhibit T, the file wrapper, is now received in evidence.

Mr. Kenway: And Exhibit T-1 has already been received in evidence, I believe.

The Court: That is the book of prior art patents cited in the file wrapper?

Mr. Kenway: Yes.

Mr. Subkow: May I ask for what purpose they are being offered? As a general offer, or is there a limitation to the offer in evidence?

Mr. Kenway: I am offering them as the patents referred to in the file wrapper, and showing the state of the art as the Examiner saw it.

Mr. Subkow: But not upon the issue of validity, and only on the issue of infringement?

Mr. Kenway: That is right.

The Court: I suppose it is relevant to the issue of validity as showing the state of the prior art and as positively negating the invention.

Mr. Subkow: No, your Honor. That is the very point that I just made my objection on. In view the stipulations, and in view of the answers to the interrogatories, and in view [271] of the fact they are not cited, under the statute they are not available to this defendant in this lawsuit as showing either invalidity or non-infringement, but only available as showing what the Examiner intended to grant.

Mr. Kenway: I differ with that, your Honor. I thought I made myself quite clear on that yesterday. I believe I said that we are not asking the court to declare the patent in suit invalid as anticipated by any of the patents in Exhibit T-1.

The Court: You mean anticipated in a strict sense.

Mr. Subkow: Then I think we ought to refer to the admissions.

The Court: Would it help, Mr. Subkow? Of course, you start out, certainly, as to the art cited that the patent is *prima facie* valid.

Mr. Subkow: That is the point.

The Court: And the burden is upon the defendant to overcome that presumption.

Mr. Subkow: Exactly.

The Court: And there might be two ways to overcome it. First, to show some prior art patents, cited or not, that pertain strictly to anticipating the invention, and the other is to negative the contention that what is done here rises to the dignity of an invention by showing that the state of the prior art was such that this advance did not [272] rise to the dignity of invention.

It seems to me that latter issue is always present in the case from the point of view of the plaintiffs' interests.

Mr. Subkow: That is true. Of course, your Honor, there is always this third party in all of these lawsuits, and we understand your Honor's obligation to the public is just as important as it is to the litigants. But these actions are also in *personam*. They are not in *rem*. And in this particular case the defendants have agreed that these things are not a part of the prior art, they will not rely upon them as the prior art, and the only thing they will rely upon were certain specific elements.

The Court: What does the statute require that they give you notice of?

Mr. Subkow: It is not only notice. It is estoppel by admission, too.

The Court: What does the statute require that they give you notice of? What patents?

Mr. Subkow: Both on the issue of prior art, and on the issue of invention, and on the issue of anticipation. The statute says—and may I have the statute? And this is all discretionary with your Honor, anyhow, and you could relieve them of that.

The Court: Yes.

Mr. Subkow: But in addition to that, we have the [273] specific admissions and the specific answers to the interrogatories, where they say they will not rely upon them. Of course, they may be relieved of that, too, but we prepared this case on the assumption that we would not have to meet these but on the issue of validity.

Mr. Kenway: I think my statement, that I am not asking the court to declare the patent in suit here invalid on the basis of the patents in T-1, should cover it. I do claim that I am entitled to show what was before the Patent Office Examiner.

Mr. Subkow: I have no objection to that. Of course, you are permitted to do that.

The Court: Very well. Are you offering it for the limited purpose of aiding the interpretation of the file wrapper? Is that it?

Mr. Kenway: Yes, sir.

The Court: There is no objection to that?

Mr. Subkow: No objection.

The Court: No objection to Exhibit T-1 for that purpose. Very well. Exhibit T is received generally, and Exhibit T-1 for the limited purpose stated, namely, to aid interpretation of the file wrapper.

(The exhibits heretofore marked Defendants' Exhibits T and T-1, were received in evidence.)

[See Exhibit T-1 in Book of Exhibits.]

Mr. Kenway: I don't propose to read from the file [274] wrapper, but just to indicate on the record two particular places in the file wrapper that we believe should be considered in connection with that defense of file wrapper estoppel, and the first reference I should like to make appears at page 17 of the file wrapper as Claim 6, and the second portion of the file wrapper comes on page 48 in an amendment which Mr. Subkow filed, making the usual argument to influence the Examiner to grant the patent. And we say that when you look——

The Clerk: Is that Exhibit T?

Mr. Kenway: Exhibit T.

(The document was handed to the court.)

Mr. Kenway: We believe, your Honor, that you will find that when you read Claim 6 and see what it was that Mr. Moon originally attempted to patent, and then read the statement to the Examiner concerning what it was——

The Court: Where does that appear now in the file wrapper, Exhibit T?

Mr. Kenway: Well, let's look at page 48, sir.

The Court: I don't care to hear the argument now, except I just want to be cited to it now.

Mr. Kenway: Yes. Claim 6 appears on page 17 of the file wrapper, and the remarks of Mr. Subkow I refer to appear on page 48 of the file wrapper.

The Court: Very well. [275]

Mr. Kenway: Now, with respect to the issue of validity, it is our position that the patent in suit is invalid because of the publication more than a year before the application was filed of certain advertising literature which disclosed the alleged invention of the patent in suit.

Some of those publications were before your Honor on our motion for summary judgment. We will offer the evidence of persons skilled in the art as to what those publications mean to them, and I believe your Honor will then conclude those publications indeed disclose every material element which is contained in the claims of the patent in suit.

The Court: Now, were those publications prior to the stipulated date of invention?

Mr. Kenway: No, your Honor. They came in the spring of 1947, and the stipulated date of invention was December 12, 1946. Those publications are not going to be offered as prior art, because obviously they are not.

However, the statute requires that a patent application be filed within a year from the time the invention is either first used in public, or sold, or described in a printed publication.

The Court: You are relying here then upon subsection (b) of Section 102——

Mr. Kenway: Yes.

The Court: ——of Title 35, namely, that “the invention [276] was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.”

Mr. Kenway: Precisely.

The Court: So you are not bringing in the question under subsection (e), whether the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the plaintiff——

Mr. Kenway: No.

The Court: ——or by the applicant.

Mr. Kenway: I might also say that in connection with those advertisements, we are not relying on Section 103, which relates to the prior art, because these publications are not prior art. They are a statutory bar to the granting of the patent under Section 102.

We also have in Exhibit S a collection of prior art patents of which due notice was given.

The Court: Do you offer those at this time?

Mr. Kenway: I offer the book of prior art patents, Exhibit S.

Mr. Subkow: May I ask whether, in view of the answers to the interrogatories stating that two of these constitute the best reference, whether all of

the references will be [277] discussed, or whether only these two will be discussed?

Mr. Kenway: Well, the answer you refer to says that we were currently of the opinion that the best references were the patents to Morton, which happens to be the first patent in Exhibit S, and the patent to Evans, which happens to be the last patent in Exhibit S.

Since that time, in discussing the subject with our expert, I discovered something I had not known before, and that is that the subject matter of the Downie patent, which is the second patent in Exhibit S, represents apparatus patented way back in 1914, but still in use in the oil fields, and, consequently, we will have some discussion of that patent, as well as the patents to Morton and Evans.

The Court: Exhibit S is received in evidence, I assume, without objection.

Mr. Subkow: Yes, your Honor.

The Court: Very well. So ordered.

(The exhibit referred to, marked Defendants' Exhibit S, was received in evidence.)

[See Book of Exhibits.]

Mr. Kenway: At this time I would like to call Mr. Purdum.

JOHN FRANCIS PURDUM

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: Will you state your full name, please?

The Witness: John Francis Purdum, P-u-r-d-u-m.

Mr. Kenway: Before proceeding with Mr. Purdum's testimony, your Honor, we have another witness who is due to meet us at 1:00 o'clock and needs to get away in a hurry, and I would like to ask permission to interrupt Mr. Purdum's testimony when he comes. It will only be about 15 minutes.

Mr. Subkow: No objection at all, your Honor.

The Court: Very well. You may do so.

Direct Examination

Q. (By Mr. Kenway): Mr. Purdum, do you have the book of patents, [279] Exhibit S?

A. No, I don't have that.

Q. You don't have one back here?

A. No, I don't have one.

Mr. Subkow: We are caught short. We didn't think we would be into this thing. We didn't bring our extra copies along. So I wanted to sort of have a huddle.

The Court: Do you need a copy?

Mr. Subkow: We have one set, but we have other sets that I wanted my associates to follow.

The Court: What is this, Exhibit S?

Mr. Subkow: Yes.

The Court: Perhaps the defendant has some others. Do you have an extra copy of the book of prior art?

(Testimony of John Francis Purdum.)

Mr. Subkow: We will manage, your Honor.

Mr. Kenway: Frankly, sir, I am in the same position. I didn't expect we would get started here. And we have another set back at the hotel.

The Court: Very well.

Q. (By Mr. Kenway): Mr. Purdum, what is your occupation?

A. At the time I am a consulting petroleum engineer.

Mr. Subkow: I will waive further qualification of Mr. Purdum.

The Court: Is it stipulated as to the witness' qualifications? [280]

Mr. Subkow: Yes, sir.

Mr. Kenway: Your Honor, in view of this business on the copies of the patents, I am rearranging the order of examination in order that we can come back after lunch fully armed with copies. And it is taking me just a minute or two to rearrange the approach.

The Court: Very well.

Mr. Kenway: I will offer in evidence Exhibit M, which is a publication in the Oil Weekly for May 5, 1947.

The Court: Any objection, Mr. Subkow?

Mr. Subkow: Excuse me. My mind was wandering.

The Court: Exhibit M is offered. It's an advertisement from the Oil Weekly. What issue was that?

Mr. Lyon: May 5, 1947, your Honor.

(Testimony of John Francis Purdum.)

Mr. Subkow: No objection.

The Court: It is said to be. Do you stipulate that it is?

Mr. Subkow: It is. And I stipulate as to the date.

The Court: Very well. Received in evidence.

(The exhibit referred to, marked Defendants' Exhibit M, was received in evidence.)

The Court: Give me that date again.

Mr. Lyon: May 5, 1947, your Honor.

Mr. Kenway: Now, I offer in evidence as Exhibit N page [281] 104 of the Oil & Gas Journal for May 10, 1947.

Mr. Subkow: Just hold it up so I can look at it.

Mr. Lyon: It's the same one.

The Court: Is it stipulated to be what it is said to be?

Mr. Subkow: Yes, sir. And as to the date.

The Court: Received in evidence. Exhibit N.

(The exhibit referred to, marked Defendants' Exhibit N, was received in evidence.)

Mr. Kenway: Now, as Exhibit O I will offer page 192 of the Petroleum Engineer for June '47.

The Court: Is it stipulated to be what it is said to be?

Mr. Subkow: Yes, sir.

The Court: Received in evidence.

(The exhibit referred to, marked Defendants' Exhibit O, was received in evidence.)

The Court: Now, I notice that it's June of 1947 and the patent application—that is, the application

(Testimony of John Francis Purdum.)

for the patent in suit, Exhibit 1, was filed June 28, 1948.

Is it stipulated that this exhibit was published prior to June 28, 1947?

Mr. Subkow: I would like to reserve that. I believe it was. But may I consult my records to see what I have discovered?

Mr. Lyon: If the court please, I think we can almost take judicial notice of the fact that the June issue comes out [282] in May and——

The Court: It might have been late that year, Mr. Lyon.

Mr. Lyon: It might have been. We have evidence on that if it is necessary.

Mr. Subkow: It won't be necessary if you can show me what your evidence is. I will agree with it.

Mr. Kenway: We can take care of that.

Mr. Subkow: Yes.

Mr. Kenway: As Exhibit P I offer in evidence page 234 of the Petroleum Engineer for May 1947.

The Court: Is it stipulated to be what it is said to be?

Mr. Subkow: Yes, sir.

The Court: Received in evidence. Exhibit P.

(The exhibit referred to, marked Defendants' Exhibit P, was received in evidence.)

Mr. Kenway: As Exhibit Q I offer in evidence the cover of the April 1947 issue of the Petroleum Engineer.

The Court: Is it stipulated to be what it is said to be?

(Testimony of John Francis Purdum.)

Mr. Subkow: Yes, sir.

The Court: Received as Exhibit Q in evidence.

(The exhibit referred to, marked Defendants' Exhibit Q, was received in evidence.)

Mr. Kenway: As Exhibit R, I will offer in evidence a photostatic copy of a page from the magazine *Oil*—or the newspaper *Oil* for April 24, 1947.

Mr. Subkow: I think we have an original excerpt of that, and I will offer it to the defendant to use in place, if they will exchange the photostat for it.

Mr. Kenway: Thank you very much.

Mr. Lyon: As a matter of fact, you supplied the photostat to me.

Mr. Subkow: That is right.

The Court: Is it stipulated to be what it is said to be?

Mr. Subkow: Yes, sir.

The Court: Received in evidence as Exhibit R.

(The exhibit referred to, marked Defendants' Exhibit R, was received in evidence.)

Mr. Subkow: We will find it this afternoon.

Mr. Lyon: We will put this one in in the meantime. It has been marked.

The Court: Very well.

Q. (By Mr. Kenway): Mr. Purdum, will you turn to Exhibit M? A. Yes, I have M.

The Court: Do you have it, Mr. Clerk?

(Whereupon the exhibit was handed to the court.)

Q. (By Mr. Kenway): Have you read the text

(Testimony of John Francis Purdum.)

and observed the photograph of the well servicing unit shown on Exhibit M? [284]

A. Yes, I have read the descriptive matter, and I have looked at the print.

Q. Will you please tell the court in your own words—or, rather describe to the court in your own words the equipment you see described and illustrated in Exhibit M?

Mr. Subkow: Your Honor, is this going to be just a reading of the document?

Mr. Kenway: No, indeed.

The Court: This is to be through the eyes of an expert in the art, is that it?

Mr. Kenway: Yes. I want to have him tell the court what a man skilled in the art derives from that publication.

The Court: The text and the photograph?

Mr. Kenway: Yes, sir.

The Court: Very well.

Mr. Kenway: Would you proceed, Mr. Purdum?

The Court: You are calling it a photograph. I suppose it is a drawing, strictly speaking, instead of a photograph, isn't it?

Mr. Kenway: Well, of course, in the magazine it is a photograph of a drawing.

The Court: Yes. I suppose that is precisely correct.

It might be more helpful for the witness to say what he sees in the drawing, first.

Q. (By Mr. Kenway): Will you please describe to the [285] court what you see in the drawing, independent of what you read in the text?

(Testimony of John Francis Purdum.)

A. In the drawing I see an automotive type of unit with two rear wheels and—that is, four rear wheels, two axles and with one axle in front with the steering device placed forward—that is, the steering wheel itself is placed forward of the front wheel, as is the cab enclosing the steering device and the seat for the driver with the necessary controls, of necessity, to run the vehicle placed in the same position.

I also see that there is a derrick or structural mast——

The Court: Where is the propelling power of the vehicle?

The Witness: The propelling power of the vehicle is shown to be at the rear, as evidenced by the louvers placed in the back section, as shown—those little lines are louvers to allow the air to circulate in this somewhat enclosed chassis.

The Court: That would indicate to you that those louvers are there to enable the circulation of air to ventilate the engine?

The Witness: Yes. It being the radiator on the engine is inside, there must be some means for the air to circulate. And I know that's quite common for some sort of a grille or louvers of some kind to be placed in the side of [286] the equipment of this type, and others that house engines.

Now, I further see that there are two drums placed in this unit, as evidenced by the two holes, or two round circles shown in the print.

The Court: That is, in the center section?

The Witness: In the center section, yes, sir, one

(Testimony of John Francis Purdum.)

almost directly above the front axle of the rear wheels and the other more or less amidship.

Q. (By Mr. Kenway): Mr. Purdum, why do they indicate to you that there are drums there?

A. Well, partially because I have had lots of experience with units of this type, and for what this is going to do I know there must be two drums to satisfactorily carry on the work of a unit of this type. And, furthermore, they are spaced—they are located, I should say, about where the drums would normally be for operating the line that carries the tubing block or traveling block, as it is sometimes called, and the other one is placed behind it so that it can operate a bailer to bail the well, or some other light device that needs to be operated rather rapidly.

Q. Would you go ahead, please?

A. I further see that this is a—that this derrick or mast, it's a welded construction, is made in two sections that can be extended to make a longer mast, one that will stick higher up in the air when it is raised at the location [287] and put into service.

Furthermore, this mast is hinged at a point in this drawing directly above the center of the steering wheel. This mast or derrick is pivoted at this point. This is a—it's real small, but there is a shaft located in this drawing directly above the driver's position, or, more specifically, above the steering wheel.

Also, there is a raising device, that is, a hydraulic ram, a hydraulic or air operated which is—the hy-

(Testimony of John Francis Purdum.)

draulic operation is much better, and so I know that from other instances of applications of this type of equipment that this is a hydraulic ram which is located in the position where it would be required to raise the derrick from the prone position in which it is hauled over the road. [288]

Q. Now, can you tell just by reference to what you actually see in that picture that there is a hydraulic pneumatic structure?

A. Well, I imagine that it has to do with me seeing and having known of devices of this kind for use in similar applications, but I can see the several steps in this drawing that indicate to me that that is not only a hydraulic ram type of thing, but that it has at least three sections. I can count three sections here that can extend one from the other to make a long enough ram to raise this derrick.

Q. Will you proceed to describe the other features you see in the drawing?

A. I see this derrick extends forward of the cab, and I took a pair of calipers, and the legs, although in the particular print I am looking at there is a bend in them, that is due to the book when the photograph was made—not the photograph, I mean when the photostat was made. The sheet wasn't smoothed out entirely straight. In other words, the book is bent a little, and that gives an indication that the derrick is bent. Well, it isn't bent because of the other prints that I have seen of this same drawing. But the leg extends far enough forward

(Testimony of John Francis Purdum.)

so that when the derrick is rotated, these legs come close enough to the ground that they can be blocked up under, or brought in contact with the ground in that manner. [289]

Now, let's see. I mentioned the cab extending forward. It has a side opening so that I can see the steering wheel. I mentioned the engine in back, and the two drums.

Q. What is that black member that is in the cab vertically, and appears to go through the steering wheel?

A. Well, that isn't too clear in this print, but there must be some support, and anyone designing a unit of this type from this drawing here would know that some support of some kind must be placed underneath that pivot point.

Q. What would happen if there was no such support?

A. Well, I would say that it would be very difficult to design a cab of a truck so that it would support the enormous load of the derrick and traveling block without considerable support.

Q. What is it that appears within the derrick structure over the cab, back to the left of the second cross brace?

A. That is what is called a traveling block, or sometimes a tubing block. This looks rather large, and so it is, at any rate, several sheaves,—a sheave block.

Q. And what is the structure that you see at the extreme left-hand end of the derrick?

(Testimony of John Francis Purdum.)

A. The structure at the left-hand side of the drawing is what is normally the top end of the derrick, and there is a sheave there, as evidenced by the circle drawn in the top block of the derrick.

Q. Assuming now that the derrick shown in this drawing has been erected, what would be the relationship of the legs of the erected derrick through the cab?

Mr. Subkow: Object, your Honor. I think the interrogation should refer to what is shown in the exhibit, not what the expert had known from his own experience.

The Court: Is that what you are calling for?

Mr. Kenway: Well, he said what the publication means to him.

The Court: We are dealing first, not with the publication, but with the drawing, as I understood the testimony up to this point.

Mr. Kenway: Yes, that is correct.

The Court: What this man versed in the art sees in this drawing.

Mr. Kenway: Yes.

The Court: Now, does your last question limit him to that?

Mr. Kenway: Well, no, it wouldn't, with the equipment in the position shown in the drawing, no, sir. I am asking what his opinion would be if the equipment which he has described were to be placed in a condition for operation.

The Court: As he sees it in the drawing?

Mr. Kenway: Yes.

(Testimony of John Francis Purdum.)

The Court: Why don't you amend your question? [291]

Mr. Subkow: Furthermore, if it requires the expert's opinion, that constitutes extrinsic evidence.

The Court: I suppose all of this is opinion in a sense.

Mr. Subkow: Oh, yes. It isn't the fact that it is opinion that is objectionable.

The Court: As he looks at the drawing, how would it be used, and what would it look like if it were extended? Is that what you are asking?

Mr. Kenway: Precisely, your Honor.

The Court: You may answer that.

The Witness: The front part of the derrick in the prone position consists of legs, and I can see two of them, the lower leg and the upper leg. Now, these legs, if they were located anywhere in the center of this conveyance, it would be impossible for them to be rotated when the derrick is raised into position without striking the front of the cab. So I know that one of these sets of legs must be on one side of the cab, and one on the other, because it is impossible to design a derrick with only one leg so that it could be raised with the hinge point as shown in this drawing.

The Court: What is that shaded rectangle at the left-hand end of the derrick in the drawing?

The Witness: At the left-hand end of the derrick?

The Court: Yes. [292]

The Witness: I believe you are referring, your

(Testimony of John Francis Purdum.)

Honor, to what is sometimes called a crow's nest, or, at any rate, those are structural members welded to the side of the derrick in order that the four legs, or that the two legs that are visible there can be fastened together and the sheave located between the two sections.

The Court: Is that what the shaded rectangle up there is?

The Witness: Your Honor, this is what you were referring to, I believe (indicating)?

The Court: Yes, but I have a white copy, and you have a black copy.

The Witness: Well, I guess that was a little reason, but that is what I am referring to, which would be the top part of the derrick when it is raised.

The Court: Could you answer better if you had this copy?

The Witness: Well, I don't like to take your drawing. Maybe there is another one.

The Court: Is there another white copy?

Mr. Kenway: Yes, your Honor.

(Handing document to witness.)

Mr. Subkow: Your Honor, may we inquire whether the defendants have the originals of the documents from which these photostats were taken?

Mr. Kenway: No. [293]

Mr. Subkow: Are they available anywhere?

Mr. Kenway: Yes.

Mr. Subkow: Where are they?

(Testimony of John Francis Purdum.)

Mr. Kenway: I have seen them in the library at the Massachusetts Institute of Technology.

Mr. Subkow: The point is that if we obtained the originals of these, may we offer them in substitution, or for temporary use? Maybe we can borrow them from the library.

Mr. Kenway: I think that would be fine. I would like to join with you in doing that, if we can get that.

Mr. Subkow: We will try it.

Q. (By Mr. Kenway): Looking at the other copy of Exhibit M, have you any corrections or additions that you want to make?

A. Just looking at the drawing?

Q. Yes.

A. Well, there are more things that I can see in the print, such as the ladder that would enable someone to climb the derrick when it is extended; a board that is placed on the derrick, which can be called a tubing board, or a rack.

There are the diagonal members that are welded in order to make the structure more or less—that is, more rigid. I am speaking of those diagonal members that go from the [294] lower leg to the upper leg.

There is a support at the back end of the truck, showing that the mast when it is in the prone position will ride in substantially a horizontal position.

Q. The drawing does not show you where the lower end of the ram is connected, does it?

(Testimony of John Francis Purdum.)

A. No, it doesn't show exactly, but knowing that it must be of some length, and sufficient so that it can raise the derrick, I know that it is located down on or substantially on the members that are run between the front and rear wheels making the chassis of the mobile unit.

From this drawing I can't tell if there is one or two rams. It doesn't indicate on the drawing whether there is one or two, but that is a minor matter. It depends upon the size and the amount of hydraulic pressure you require, whether you have one or two rams.

Mr. Kenway: If your Honor please, the witness has testified concerning what the drawing means to him. As far as the text is concerned, I believe that should speak for itself, unless there are some technical matters referred to there on which it would be helpful to your Honor to have expert assistance.

The Court: No, unless you want the record to show some interpretation of it.

Mr. Kenway: No, I am satisfied with it. [295]

The Court: The problem here, of course, as I view it, is whether this drawing discloses the invention as taught in the patent.

Mr. Kenway: Yes, sir.

The Court: That is the patent in suit, Exhibit 1.

Mr. Kenway: It is not just the drawing, your Honor.

The Court: The drawing with the text,—

Mr. Kenway: Yes.

(Testimony of John Francis Purdum.)

The Court: ——the entire information.

Mr. Kenway: And we have had an expert's opinion on what the drawing shows, and it seems to me the text can be taken in conjunction with the witness' testimony, and that it speaks for itself.

The Court: Very well.

Q. (By Mr. Kenway): Now, would you turn to Exhibit N, Mr. Purdum. I will simply ask whether or not the drawing shown in Exhibit N differs from the drawing in Exhibit M, concerning which you have testified.

A. I think they are identical drawings. They are different in size, so they have been changed, that is, the people that printed this sheet did not use the same cut as was used in the other publication, but it is a cut made from the same drawing.

Q. Now, would you turn, please, to Exhibit O.

A. I don't happen to have O in front of me.

The Court: Will you hand it to the witness?

(The document was handed to the witness.)

Mr. Kenway: Your Honor, Mr. Subkow tells me that, believing we would not get along so fast, he did not bring his copies of these exhibits.

The Court: Then we will take the noon recess at this time until 2:00 o'clock.

(Whereupon at 11:55 o'clock a.m., an adjournment was taken until 2:00 o'clock p.m. of the same date.) [297]

Thursday, March 27, 1958. 2:00 p.m.

(Other court matters.)

The Court: All right. We will proceed with Moon against Cabot Shops.

Mr. Lyon: If the court please, at this time we will call Mr. Stan Groner.

While Mr. Groner is taking the stand, I will state that I believe we have entered into a stipulation that Exhibit O was published prior to the filing of the application for the patent in suit, and that if called to the stand Mr. Crowley would testify that he personally saw a copy of Exhibit O in the library of the Massachusetts Institute of Technology with a date of filing stamped stating that it was received by that library on the 4th day of June, 1947.

Is it so stipulated?

Mr. Subkow: I need no such assurances. Their word is good enough. I will accept the exhibit as to its proper date.

The Court: And that it hadn't been published more than a year prior to the filing of the application for the patent in suit?

Mr. Subkow: Of course, your Honor.

The Court: Very well.

Mr. Lyon: Has the witness been sworn? [298]

The Clerk: Not this witness.

STANLEY GRONER

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

(Testimony of Stanley Groner.)

The Witness: Stanley Groner, G-r-o-n-e-r.

Mr. Lyon: If the court please, we appreciate the courtesy of interrupting the testimony of Mr. Purdum so that this witness, who is an employee of one of the local manufacturing concerns, can get back to his job.

I would state for the record that if you will look around you will see that Mr. Purdum has been excluded from the courtroom so that he will not hear the testimony or the cross examination of this witness, which might possibly affect Mr. Purdum's testimony.

Mr. Subkow: I think your Honor is entitled to an explanation.

I understand that this witness will be testifying over exactly the same ground that Mr. Purdum will be testifying. In other words, we are having two witnesses on the same subject. And I don't quite understand, but there must be some point in that.

Mr. Lyon: You will, Mr. Subkow, as we proceed.

Mr. Subkow: I am sure. But I don't think it would [299] be fair for one witness to hear the cross examination which might influence his testimony.

The Court: Very well.

Do you think that it's necessary to have two experts on this subject?

Mr. Lyon: Well, if your Honor will bear with me for a minute I think you will see what is going on.

The Court: Very well.

(Testimony of Stanley Groner.)

Direct Examination

Q. (By Mr. Lyon): Will you state your educational qualifications, Mr. Groner?

A. Yes. I graduated from California Institute of Technology with a Bachelor of Science degree in mechanical engineering.

Q. And since you received that degree in mechanical engineering at Cal Tech have you been employed locally?

A. Yes. I have been employed by Hydro-Air Incorporated in Burbank.

Q. What is the business of Hydro-Air, in general?

A. We manufacture aircraft accessories.

Q. What has been your assignment at Hydro-Air?

A. More recently I have been project engineer in charge of aircraft fuel pumps, and previous to that I did [300] design work on the same subject, and also laboratory test work on the same subject.

Q. Now, you first met me when I called you in as a witness in my capacity as attorney for Hydro-Air, is that a fact?

A. Yes, that's right.

Q. And your association with me has been entirely on the business level?

A. That is right.

Q. Now, have you ever seen a copy of the patent in suit in this case?

A. I don't know what that patent is.

Q. You never have seen a copy?

A. No.

Q. Have you ever seen a portable drilling rig?

(Testimony of Stanley Groner.)

A. The only drilling rig which I have seen which might be considered portable is one that I saw at a site for a water well. [301]

Q. Have you ever seen a portable drilling rig for servicing oil wells? A. No, I have not.

Q. Have you ever seen any of the patents that have been pleaded by the defendant in this case?

A. I don't know what they would be.

Q. You have, however, been shown copies of certain publications, such as, for instance, Exhibit P, which is before you, have you not?

A. Yes, I have.

Q. I might ask you, have you ever worked on an oil well drilling rig? A. No, I have not.

Q. Then, I take it, that you are more or less free from any specialized knowledge with respect to oil well drilling rigs; is that so? A. Yes.

Q. But you are a design engineer?

A. Yes.

Q. Now, I ask you to take a look at Exhibit P, which is before you, and tell me what it teaches you as a design engineer as to the design of whatever that is that is shown in the drawing and text in Exhibit P.

Mr. Subkow: I object, your Honor. It has been fully proven that this man is not qualified to answer that question. [302]

The Court: He is qualified to say what he sees there, isn't he?

Mr. Lyon: The point of the whole thing, your Honor, is that Mr. Subkow would quite properly

(Testimony of Stanley Groner.)

argue that Mr. Purdum is an expert in this art, that he knows all about the patent in suit, and knows all about the accused device, and can take the drawings and find the various elements of the patent, because he knows what would be done. But here is a man absolutely innocent of that special knowledge, and I want to show you he can do as good a job of that as Mr. Purdum did.

The Court: The objection is overruled. He may answer.

The Witness: Then I would describe this as a self-propelled servicing and drilling rig that drives into the location nose first. It seems to be a truck which has three sets of wheels, a cab, and——

Q. (By Mr. Lyon): What are the wheels supported on?

A. I presume you mean axles, or something of that sort?

Q. Are there three axles there?

A. Yes, there would be three axles.

Mr. Subkow: I object, your Honor, and move the answer be stricken. We are dealing with what is shown in the drawing, not what he presumes is shown in the drawing.

The Court: That is probably a habit of speech. We can't [303] take presumptions.

The Witness: Yes, sir.

The Court: You have to state what you see there.

Q. (By Mr. Lyon): Just go ahead and state what that drawing and text teaches you with respect to that item?

(Testimony of Stanley Groner.)

The Court: And there can't be any maybes about it. It does or does not. It teaches you or it does not teach you.

The Witness: Then if I could go back about the wheels?

The Court: We can't have maybe three wheels. You have either two, or four, or whatever there are.

The Witness: Yes, sir. There are three wheels shown.

The Court: We would all like to do that. I would like to render maybe judgments, and it would be lots easier than to say it is this way or that way, you see.

The Witness: I could say that from my knowledge of such vehicles this drawing would indicate that the wheels would be attached to the truck by means of axles. Would that be satisfactory?

Mr. Subkow: I think that perhaps the witness will need some additional instruction from your Honor as to reading what the thing shows, and not what may be read into it.

The Court: It is not what you guess from it, and not what you deduce, but what does that drawing teach you——

The Witness: All right. [304]

The Court: ——as a mechanical engineer.

The Witness: All right.

The Court: What do you read, as you read that drawing?

The Witness: On top of the vehicle——

(Testimony of Stanley Groner.)

The Court: What kind of structure does it teach you to make——

The Witness: All right.

The Court: ——if you were trying to depict it? Would that be fair?

Mr. Subkow: Yes.

The Witness: This would teach me to make a self-propelled vehicle, which has a cab, which has an engine, and which has a telescoping derrick. The derrick is mounted on top of the vehicle. The two pictures show that in one position the derrick is carried in a horizontal position, and that it may be erected into a nearly vertical position, and also extended.

Q. (By Mr. Lyon): How is it moved, if you can tell from the drawing, how is it erected from the horizontal to the nearly vertical position?

A. There is a device that is located to the rear of the cab, which looks like it would be a jack of some sort, which could apply a force to the derrick, which would erect it. In that case the derrick would be hinged at a point just above the cab. The end of the derrick which is in front of the cab would go to the ground, and would be supported on the [305] ground.

Q. What would be the relationship of the parts you have just referred to as going to the ground with respect to the cab in the erected position?

A. The ends which would serve as legs would be below the cab. One set of legs in the small drawing appears to be just in front of the cab, and the rear

(Testimony of Stanley Groner.)

legs would be right underneath the cab in front of the front wheels.

Mr. Subkow: May I inquire from what portion of the exhibit the witness is testifying?

Mr. Lyon: I believe he is testifying from the trademark at the present time, isn't he?

Mr. Subkow: May we ask the witness that question?

The Witness: Well, I am looking at Exhibit P.

Mr. Subkow: Exhibit P. Would you identify it by the date, please?

The Witness: Yes, it says "The Petroleum Engineer of May, 1947," in the lower right-hand corner, and it has the number 234 in the left-hand corner.

Mr. Subkow: That is Exhibit——

Mr. Lyon: That is right, Exhibit P.

The Witness: And there are two pictures of this device shown on this page, and I am referring to both pictures.

Q. (By Mr. Lyon): Now, I would like again to call your attention to the derrick. Is that an open frame work? [306]

A. Yes, it is open. It is not filled in between the structure.

Q. Is there a cross bracing on there?

A. Yes, there are cross bracing.

Q. Compare the cross bracing in the section nearest the fore part of the cab with the section right behind it.

A. The cross bracing just above the cab, the braces go from the portion of the structure which

(Testimony of Stanley Groner.)

would be on the top in the horizontal position, and in the front in the erected position, and these braces go from there to just above the cab, forming a V with the vertex—or, triangle with the vertex right on top of the cab, and the——

Q. Well, you may have answered this question, and I may have missed it, but I want to beg indulgence and ask it again in case I did miss it. Where would the rear legs of the derrick be with respect to, shall we say, the steering wheel in the erect position?

A. If by the rear legs you mean the legs that are to the bottom when the derrick is in the horizontal position, and towards the rear of the truck when it is in the upright position,——

Q. That is right, that is what I mean by the rear legs.

A. ——those legs would be just about underneath the steering wheel. [307]

Q. You mean side by side of the steering wheel? Is that what you mean?

A. Below it, and if we were to draw a vertical line from where those rear legs rest on the ground, it looks like it would go through the steering wheel.

Q. I believe you have testified that there is something which appears to you to be a jack.

A. Yes.

Q. If that is a jack, how would it be connected to the vehicle?

Mr. Subkow: I object, your Honor. The question is not directed to what the picture shows.

(Testimony of Stanley Groner.)

Mr. Lyon: I assume it is. He is an engineer and is interpreting a drawing.

Mr. Subkow: It is not what he is reading into the drawing. It is what the drawing shows.

The Court: If he says it appears to be, it means he perceives it with his sense of sight, I assume.

Mr. Lyon: Yes.

The Court: Overruled. We are getting into language troubles now.

Mr. Subkow: Well, language is a little important in these matters.

The Court: Yes, it is, but if the witness says it appears to him to be, he perceives it with his senses.

Mr. Subkow: If so understood, all right.

The Witness: Would you repeat the question, please?

Q. (By Mr. Lyon): I said if that is a jack, which you said it appears to be,— A. Yes.

Q. —I said, how would it be connected to the vehicle?

A. It is in two different positions in the two views, so it must be connected at some sort of hinge pin. [309]

Q. Or pivot, can we say?

A. Yes. A pivot would be the same.

Mr. Subkow: Just a moment. The question and answer raises my very point. May we have the question and answer read by the reporter?

The Court: Please read it, Mr. Reporter.

(Record read.)

(Testimony of Stanley Groner.)

The Court: Do you mean by "it must be," that it appears to you to be?

The Witness: Must be——

The Court: You see, when you say "it must be" you are arguing your answer, and you haven't even given us an answer.

If you say "It is connected there," or "appears to be connected" to you, and then if the other attorney says, "How do you know," then you can say, "It must be." You can argue your answer then.

The Witness: I see, your Honor.

The Court: All you are doing now is giving your answer. You don't argue.

Now, if you see it there, if you perceive it there, then you may say so.

Q. (By Mr. Lyon): I believe you stated, Mr. Groner, that you see it——

Mr. Subkow: May we have the answer?

The Witness: From the—— [310]

Mr. Subkow: I don't think that it's fair for the interrogator to place words in the witness' mouth.

Mr. Lyon: I am not placing words——

The Court: Well, that is objectionable as to form. This is a very intelligent witness. Let him proceed. I think he knows the problem, what he is here for.

Mr. Lyon: Well, is there a question before the witness?

The Witness: Unless there is further clarification required about how this thing is joined to the vehicle.

(Testimony of Stanley Groner.)

The Court: Well, you tell us how you see it is from that drawing, as a mechanical engineer.

The Witness: I would say from these two views it is joined at a hinge point by a hinge joint.

Q. (By Mr. Lyon): All right. Where would that hinge joint be on the vehicle with respect to the front end rear axles?

A. It would be between the front and rear axles.

Q. In the large drawing do you perceive—I believe you stated you see a steering wheel, is that correct? A. Yes.

Q. Where is that steering wheel with respect to the front axle?

A. It is in front of the front axle.

Q. I am handing you a document which is in evidence as Defendants' Exhibit M, and I ask you if from the drawing [311] and the text of Exhibit M you would testify that you receive substantially the same teaching as you have received from Exhibit P.

The question can be answered yes or no.

A. From the picture—it is substantially the same picture, just a little different size, as the large picture in Exhibit P with the derrick horizontal.

Would you like me to read the text and compare that, too?

Q. Oh, I forgot to ask you one thing about Exhibit P. Does it say anything, or does it teach you anything about where the motor would be located?

(Testimony of Stanley Groner.)

A. Yes. It says that the motor is located in the rear.

Q. All right. Going on with Exhibit M——

Mr. Subkow: I beg your pardon. Was that answer in connection with Exhibit P or Exhibit M?

The Witness: It's Exhibit P.

Q. (By Mr. Lyon): Going on with Exhibit M, I ask you if your testimony would be substantially similar as to the teaching you receive from Exhibit M as it was as to Exhibit P?

A. All right. Let me read the text, please.

Well, it adds one point that was disputed before, and that is, it says in Exhibit M that there are six wheels [312] and before I could only say that I saw three wheels.

Q. That's about all that it differs from the teaching you got from Exhibit P, is that correct?

A. That's correct.

Q. I hand you Exhibit N and ask you the same question with respect to Exhibit N.

A. Here again the picture is essentially the same, just of a different size.

Yes, I have learned substantially the same thing from this exhibit.

Q. I hand you Exhibit P——

Mr. Lyon: No. We have already testified to Exhibit P. Have we two of them here?

Q. (By Mr. Lyon): I hand you Exhibit Q and call your attention to the cover of that and ask you if your answer would be the same as to Exhibit Q as it was to M, N and P?

(Testimony of Stanley Groner.)

A. I seem to have lost P here.

Q. I gave you the original instead of the copy.

A. Yes. If this is Q it looks identical to P.

Q. It's exactly the same, the publication is, except that it's another——

A. Right.

Q. I hand you Exhibit O and call your attention that this is somewhat different and ask you if you would get the same teaching from Exhibit O as you got from these other [313] M, N, P Exhibits, and if you see anything there in addition that you would gather from the exhibit—whatever it is you have before you—on O that you didn't gather from any of the other exhibits.

A. Well, in this exhibit I can see the axle joining the two front wheels which I couldn't see before. And I have a little better picture of the derrick because it shows part of the end of it. I can see all four legs now, which I couldn't see before. That's about what it adds.

Mr. Subkow: May I have that question?

(Question read.)

Mr. Subkow: Is it proper for me to ask a question through the court?

The Court: You may.

Mr. Subkow: Very well. Do I understand that the witness is testifying that he gets the same teaching out of this exhibit that he got out of the others?

The Court: "This exhibit" being——

Mr. Subkow: The same teaching out of Exhibit O as he did the other exhibits.

The Witness: I said that I have learned a little

(Testimony of Stanley Groner.)

bit more in this exhibit than I saw from the others.

Mr. Subkow: You mean merely in addition to, but except for that difference it is the same as the others?

The Witness: That's right. [314]

Q. (By Mr. Lyon): I hand you Exhibit R and ask you the same question.

A. That is the same picture, essentially; just a different copy.

Q. The same as P and Q, is that right?

A. Yes.

Mr. Lyon: Those are all the questions I have of this witness.

Cross Examination

Q. (By Mr. Subkow): Mr. Groner, if I were to ask you to assume that there were two-legged telescopic derricks side by side, not four-legged telescopic derricks, and you had that information at the time that these exhibits became reality, were published, would your conclusion, omitting your reference to Exhibit O, be the same with respect to these exhibits with respect to their being a four-legged derrick, as you testified?

A. I can't really accept what you said at the beginning because I don't understand how a two-legged derrick—I don't see how a two-legged derrick would be——

Q. I am asking you to assume that fact to be a fact.

A. Since all the other exhibits, with the excep-

(Testimony of Stanley Groner.)

tion of Exhibit O, just show a side view, I can only see [315] one side and consequently I only see two legs.

Q. In that case your whole testimony would have to be different from that respect?

A. I don't believe that in my original testimony I said that there were four legs previous to seeing Exhibit O.

Q. If there were only two legs you would then have to assume that the legs were where positioned in order for them to—in what respect they would have to be positioned in order for them to take the posture that you testified you read into the exhibit.

A. If this were a two-legged derrick, then in the picture with the derrick erected I would say that they would be between the viewer and the truck.

Q. In that case they couldn't be hinged, could they?

A. I don't understand that question.

Q. I mean, how could you get it off the truck and standing up if it were hinged, in your view?

A. Well, there is certainly a hinge joint between the end of the jack and the derrick.

Q. I am not talking about that hinge joint, assuming there is one.

How, in your view, would that derrick get off that truck and stand up, as it does in the trademark, if it were a two-legged derrick? [316]

A. Well, I would say that there must be some hinge point other than at the end of the jack in order to get it to come down with this end first.

(Testimony of Stanley Groner.)

Q. In other words, you need additional information than is apparent in these exhibits in order to answer that question, wouldn't you?

A. I see the derrick in two positions, one with it horizontal and one with it vertical; and I have to ask myself, "Well, how does it get into the vertical position?" And so——

Q. It being a two-legged derrick.

A. The answer that I give myself is that the jack pushed the derrick up, and by using some other technique such as the hinge point or hinge or pivot, the derrick would then go down with the legs to the ground.

Q. Well, it would have to go down between the observer and the picture, would it not?

A. Yes.

Q. Then it would have to sort of slide off to the side and get down and stand up?

A. That wouldn't be necessary.

Q. Have you ever——

A. I don't understand that question.

Q. Well, perhaps I don't understand the testimony too well. We see the picture on Exhibit Q, for example. You state that as far as Exhibit Q is concerned—— [317]

A. Yes.

Q. ——we can only see a derrick with two legs. Is that correct?

A. That's right.

Q. And that, of course, you say is resting on top of the cab. Is that correct?

A. It's resting on top of the device, yes.

(Testimony of Stanley Groner.)

Q. Yes. Well, then, it must be within the confines of the lateral sides of the cab.

A. Not necessarily. [318]

Q. Well, where would it be, in your opinion?

A. Well, it could be on either side, or on top of it.

Q. Let's see. There would have to be some provision that would have to be made to carry it so it is on the side of the cab, so that if it slides down alongside of the truck, to get the position in the trademark?

A. Well, in this picture, as I mentioned before, I can see one side of a derrick, and let's say it is a two-legged derrick, and there is what appears to be a jack attached to it. Now, there could be a cross member which went across the top of the truck, to which that jack was attached, and then this two-legged derrick could be at the end of that cross member, so that it could be on the side of the truck, or it could be on the top of the truck. I can't tell from this view.

Q. That is right. So that in order to complete your interpretation of what these pictures show in Exhibits P and Q and in Exhibits M and N, which you say are the like structure, you would need the information that is at present in Exhibit O, wouldn't you, which tells you it is a four-legged derrick?

A. That's correct.

Q. Now, will you look at Exhibit O?

Mr. Subkow: Has your Honor a copy of Exhibit O?

(Testimony of Stanley Groner.)

The Court: I have seen it this morning. I don't have it [319] here.

Mr. Subkow: It might be confusing.

The Court: Maybe the clerk can hand it to me?

The Witness: Could we share it?

The Clerk: The witness has it.

The Court: Oh, yes. You go ahead.

Q. (By Mr. Subkow): Now, take a good look at Exhibit O, and take a good look at the upper left-hand picture.

The Court: I see it.

The Witness: Oh, excuse me.

Mr. Subkow: If you would like to use mine——

The Court: I can see it. Thank you.

Q. (By Mr. Subkow): Would you say in that upper left-hand picture that the lower part of the derrick that extends over the cab is wider or narrower than the cab?

A. From just looking at that picture, I couldn't tell.

Q. Notice the clear space between the derrick legs and the top of the cab.

A. It must be that white line there (indicating), yes.

Q. Would you say that picture shows a hinge between the derrick and the cab?

A. No, I don't see a hinge in this picture between the cab and the derrick.

Mr. Subkow: May I have a moment to consult with my [320] associate?

The Court: Yes.

(Testimony of Stanley Groner.)

Mr. Subkow: That is all, your Honor.

The Court: Gentlemen, it just occurred to me that there were certain answers to interrogatories that were submitted this morning. Did you intend that they be copied into the record?

Mr. Subkow: We were admitting them by reference.

The Court: I didn't know whether you intended them to be copied or not.

Mr. Subkow: They could be copied. I think it would be more convenient if they were copied in.

The Court: I don't remember anything being done either way, and I wondered if you overlooked it.

Mr. Subkow: I had thought we were just doing it by reference, but I think they ought to be copied in the record, and then they will be there, and there will be no question. I would prefer it that way.

The Court: It is sufficient either way.

Mr. Subkow: I know, but I think it would be more convenient if they were copied into the record.

The Court: Mr. Clerk, what are the exhibits?

The Clerk: I can give them to the reporter.

The Court: 102, 103, 104 and 105.

The Clerk: They are in the file. [321]

The Court: Do you wish the pretrial conference in there, too?

Mr. Subkow: Does that need to be copied into the record?

The Court: I should not think so, unless you want that.

(Testimony of Stanley Groner.)

Mr. Subkow: No, I think that could be there as a physical exhibit, and as a reference.

The Court: All right. Then you will provide those exhibits to the reporter and they will be copied in the record at the point where offered.

Mr. Subkow: Yes.

Redirect Examination

Q. (By Mr. Lyon): Now, if you were designing or building a portable drilling rig or servicing rig in accordance with your concept of what the Wal-drip Engineering Company was here advertising in Exhibits M, N, P and Q, would you build it with two legs or four legs?

Mr. Subkow: I object, your Honor. This witness has been clearly qualified as not being an expert or even having any acquaintance with this art.

The Court: He is a mechanical engineer.

Mr. Subkow: Well, perhaps he ought to be asked whether he feels he would be competent to define such a thing. [322]

The Court: I assume you may inquire. It would go to the weight rather than the admissibility.

Mr. Subkow: Oh, indeed, yes, but I think it is a rather important qualification that has to be made.

The Court: He may answer.

The Witness: Would you repeat the question, please?

The Court: Please read it, Miss Reporter.

(The question was read.)

The Witness: Four legs.

(Testimony of Stanley Groner.)

Q. (By Mr. Lyon): When you first saw Exhibits M and N——

Mr. Subkow: Did your Honor sustain my objection or overrule it?

The Court: I overruled the objection——

Mr. Subkow: I am sorry.

The Court: ——on the ground it would go to the weight rather than the admissibility.

Mr. Lyon: I have no further questions.

The Court: Do you wish to interrogate the witness further, Mr. Subkow?

Mr. Lyon: Just a minute.

Q. Have you ever seen a two-legged derrick?

A. No, sir, I have not.

Mr. Lyon: That is all.

The Court: Any recross examination? [323]

Recross Examination

Q. (By Mr. Subkow): You have had no acquaintance with oil field practice?

A. That's right.

Q. And you have never seen a telescopic double pole mast?

A. From your terminology, I don't believe I would say that I have.

Mr. Subkow: That is all.

Mr. Lyon: Are you finished?

Mr. Subkow: Yes.

The Court: You may step down.

Mr. Lyon: May this witness be excused to go back to his business?

(Testimony of Stanley Groner.)

The Court: Yes, he may.

Mr. Lyon: Thank you.

(Witness excused.)

The Court: We will take the afternoon recess at this time.

(A short recess.) [324]

JOHN FRANCIS PURDUM

a witness called on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Mr. Subkow: Your Honor, I understand we are going over the same ground with this witness. In view of the argument that this witness, because he is an expert, is not as well qualified to testify as to what is present in these exhibits as would be an ordinary man skilled in the art, do we need any such testimony on this further?

Mr. Kenway: I was just about to say, your Honor, that Mr. Purdum has testified about two of these advertisements, and I think that would be enough. I didn't think it would be necessary to take up our time to have him go over the others. But Mr. Subkow is perfectly at liberty to cross examine on any of them.

The Court: Very well.

Direct Examination—(Continued)

Q. (By Mr. Kenway): Mr. Purdum, will you take the book of patents, Exhibit S, please, and will you turn to the first patent in the book, the Morton

(Testimony of John Francis Purdum.)

patent, No. 966,345, patented August 2, 1910, and will you refer to that patent, please, and tell the court what the apparatus is and how it operates and the [325] salient features of it—not every nut and bolt.

A. The patent in question is F. C. Morton, and the name of the apparatus is “Apparatus for Fighting Fires.” Application was filed April 20, 1904.

This apparatus consists of a four-wheel vehicle on which is mounted a ladder that can be raised or lowered with a hydraulic means. This ladder is hinged at the front end of the vehicle. A driver’s seat is located at the front end of the vehicle. There is an engine and a pump located at the rear of the vehicle. There are two outriggers located at the front end of the vehicle.

Q. Where do they appear, Mr. Purdum?

A. Pardon?

Q. Where do the outriggers appear?

A. They appear on Figure — pardon me. I am still looking at Figure 1 on the first page of the patent. And they are numbered there. The outrigger itself, I believe, we could call 281. It consists of an arm, at least, 281, with a screw 286—I believe that is the designation for the screw — that can be run down to contact the ground to take the load off of the front axle.

Now, this vehicle can also be adapted to carry a tower, an extension tower, that is also raised and lowered by hydraulic means.

Q. Is that what we see in Figure 10? [326]

(Testimony of John Francis Purdum.)

A. Yes. It is shown in several of the Figures, but better in Figure 10 than in some of the others.

Q. What kind of a tower is it?

A. This is a tower for carrying workmen, firemen, I should say. Also, it has several other features that—it is equipped with a hose not evident on this print, but in the description. And on the other prints there is a hose and a sheave for lowering injured persons. [327]

That I believe is the salient features of this machine.

Q. Now, referring to the hydraulic means you spoke of, would you identify that, say, in Figure 4, and explain how it works, and where the thrust is taken while it is operating?

A. Let's see. Figure 4. Figure 4 shows the method for raising the lower section. In fact, it raises all of the sections together of this tower. There is a hydraulic cylinder, and I believe that is 195. At any rate, the 195 is right above the hydraulic cylinder, and a piston, a cross arm 51 that exerts the power through 50 to this bracket, which is numbered 189 in the front of the truck. When the power is applied, the hydraulic pressure, then, at a point in the vicinity of 195,—this piston is pushed forward toward the front end of the vehicle, exerting a force on the plunger, which will rotate about the axis at pivot pin 47.

In this operation the thrust would be taken by the slide members 52, and there would be a horizontal and a vertical thrust along that slide.

(Testimony of John Francis Purdum.)

Q. And where is that with respect to the front and rear wheels?

A. Here (indicating). It is almost midway, but it is between the front and rear wheels.

Q. Referring to Figure 1 of that patent, you spoke of an engine. Would you point out just where that is, and what the [328] engine accomplishes?

A. You said "engine"?

Q. Yes.

A. The engine is 197 on the print in Figure 2, and that is at the rear of the truck in that little box-shaped affair (indicating). The cylinder 199 amidship in the vehicle contains compressed air. This 197 is a compressed air engine that runs the pump 198 to furnish the hydraulic power.

Q. And how is the vehicle propelled?

A. It says in the literature here that this particular one is moved with horses or some other convenient means.

Mr. Subkow: Is the witness reading from something upon which he has notes, or something of that kind?

The Witness: I have made some notes in the interests of time of this.

Mr. Subkow: May we inspect the notes?

Mr. Kenway: Certainly.

Mr. Subkow: And would the witness be so good as to refer to the section in the literature to which he has referred?

The Witness: I believe I can. I went through here. It is so hard to find some things sometimes

(Testimony of John Francis Purdum.)

that I made just some red marks. This would be in column 1, page 1, line 33 or 34,—33. [329]

Q. (By Mr. Kenway): Is it 33 or 23?

A. Excuse me. Yes, it is 22. I will start reading from line 20:

“For this purpose the working parts of the apparatus are carried by a vehicle which may be drawn by horses or otherwise propelled.”

I believe that I answered your question.

Mr. Kenway: Yes. Would you like to inspect the copy of the patent?

Mr. Subkow: Not at this time.

Q. (By Mr. Kenway): Now, will you turn, please, to the last patent in the book, the patent to Evans, and will you please tell the court about the salient features of that patent?

A. This patent is N. P. Evans' patent. It was applied for December 9, 1943. The number of the patent is 2,488,180, and it is titled, “Mobile Hoisting and Conveying Apparatus.”

This apparatus also consists of a four-wheel conveyance. It has an engine in the rear. In one instance in Figure 1 is shown—they call it a jib crane. It also has a hoist located between the front and rear wheels, a steering wheel, and a seat with a cab that can be placed over the driver if they wish.

Q. Now, what do you see in Figures 10 and 11?

A. In Figure 10 and Figure 11—Figure 11 being the [330] side view of the same apparatus—is shown this same conveyance, on which is mounted a hinged mast or frame at the front end of the vehicle.

(Testimony of John Francis Purdum.)

The frame is hinged at some distance above, that is, higher than the driver's position, and somewhat forward.

There is a support at the back end of the unit or conveyance that supports the top part of this frame or mast when it is lowered when it is being moved.

Q. Is that the piece 120?

A. The support member is numbered 120, yes.

Q. What does the reference character 119 indicate?

A. 119 refers to the hinge point that the upper section of the frame work is turned about.

Q. Would you now describe the member 110? What does that consist of?

A. Is that in the same——

Q. Yes, that is higher up.

A. Oh, 110 is the upper section of this four-legged framework.

Q. And what is the equipment used for?

A. It is mobile hoisting and conveying apparatus, and it is used for raising and moving loads of different kinds, and I presume on a platform, that this 111 could be run in underneath, but it is used to move—to raise and lower and to move the items.

Q. Does that complete your description as to the salient features of the Evans patent?

A. I believe that is all that could be of interest.

Q. Would you now turn to the second patent in the book, the patent to Downie, 1,096,022, and tell the court concerning the salient features of that patent.

(Testimony of John Francis Purdum.)

A. This patent is—well, there are several inventors here, and one of them is Robert M. Downie, and it is a well drilling machine.

The patent itself pertains to the shock absorbing features of a drilling machine of this nature. However, the drawing, Figure 1, shows some items of interest.

This also is a four-legged contraption with front wheels and rear wheels with a mast hinged at the front of the conveyance and with, in this instance, a steam engine located at the back of the conveyance with two hoisting drums between the wheels, and controls for operating the hoisting equipment located in the front, at the front corner of the machine.

The one thing of interest regarding this machine is that the same general type is still in use in drilling shallow wells and drilling wells in after rotary in several parts of the country. I saw one just the other day in operation.

Q. Mr. Lyon is holding an object. Would you tell us what that is, please?

A. This is a model of a well servicing—drilling and [332] servicing rig.

Q. Any particular apparatus?

A. Pardon?

Q. Does that represent any particular apparatus you know about?

A. Well, it is a particular kind of a rig, and it is fixed so that the engine designated by this part (indicating), and the driver's position as shown by

(Testimony of John Francis Purdum.)

this section, can be put on either end of the chassis, that has wheels and has a derrick. The rams, hydraulic rams, are not functional due to the expense involved in making them functional, but they indicate more or less the position of the rams when the derrick is raised, and also when it is in the horizontal position.

The Court: Is that a miniature of some device that is known, or was that just made up for some purpose of demonstration?

The Witness: By changing the position of the hinge point here, it can be assembled very quickly into what will show either the drive-in type of unit or the back-in type of unit. That was the reason it was made in this way, so that we could easily see just what was involved in the exchange of the of the parts.

The Court: There is one hydraulic ram on either side. Is that taken from some device? [333]

The Witness: Well, there could be but one, but there are two hydraulic rams on many of the units that are made of this type.

Q. (By Mr. Kenway): And who made the model, Mr. Purdum?

A. I made the model. Maybe I should apologize for it a little.

Mr. Kenway: I will offer in evidence the model identified by the witness as Defendants' Exhibit X, and I should explain that the model is not offered as accurately representing any particular unit. It was just constructed to show the various parts and

(Testimony of John Francis Purdum.)

their relationship as a demonstrator. We are not trying to prove anything by it except what the witness has testified to. But, frankly.—

The Court: Is it illustrative of the witness' testimony?

Mr. Kenway: To a certain extent, yes. Frankly, we had in mind that it might be helpful to your Honor to see that operated, but in view of the large number of photographs and the discussion and the testimony, I think it is superfluous from that standpoint, but I would like to have it in the record, if your Honor please. [334]

The Court: Well, it might be helpful to see it operate. I don't know. Is it a model of the accused device, or is it a model of the device taught by the patent in suit?

Mr. Kenway: No. I think it would be fair to characterize it as a model which in one condition is reasonably representative of the back-in type that have been discussed, and which when rearranged it can be made either to illustrate the subject matter of the claims of the patent in suit or the structure as manufactured by the defendant.

Mr. Subkow: I take it that it is sort of a non-verbal argument then.

Mr. Kenway: Yes, in a sense.

Mr. Subkow: In that case it's not evidence.

The Court: It shows what can be done if you take all the elements and mix them up a bit? Is that it?

Mr. Kenway: Yes. It's in support of the issue

(Testimony of John Francis Purdum.)

in the pretrial order that what we have involved in the patent suit is merely a reversal of old parts.

The Court: Any objection to it?

Mr. Subkow: If it goes in merely as a non-verbal argument. But it's not evidence, as I view it.

The Court: Very well. It will be received as Defendants' Exhibit A. [335]

(The exhibit referred to, marked Defendants' A, was received in evidence.)

Mr. Kenway: I would be glad to have the witness demonstrate it, your Honor. I just didn't want to pour on any more——

The Court: That might be helpful.

Mr. Kenway: Will you set it up, Mr. Purdum?

The Court: Can the witness depict it to where it operates in accordance with the teachings of the patent in suit and then point out—is there a replica or anything here showing the accused device so that I can compare it to that?

Mr. Lyon: Do you need anything else, any tools?

The Witness: No, I don't believe I need a thing. I am sorry that this is a little bit low.

The Court: I don't want the Government to give you a claim for damaging the furniture here. Do you need some newspapers?

Mr. Kenway: That would be good.

The Witness: I don't believe I am scratching anything. I believe it's all right.

(Whereupon papers were placed beneath the exhibit.)

The Witness: Now, I'm placing the driver in the

(Testimony of John Francis Purdum.)

hinge point more or less—well, I believe I should move him out just a little. Now, that hinge point is, as near as I can tell, directly above the steering wheel. The engine now is in the back of the truck.

Now, we will raise the mast. The legs straddle the driver in the driver's position. The driver is—well, I guess you could say that at least the bottom of the steering wheel is slightly above the front axle. The derrick is sloped forward a little.

And if your Honor will disregard this brace. I wanted to put it in there. It shouldn't be there. And it interferes with the wire line.

And I might state that this derrick is sloping forward a little more than it would if it were higher. There's a certain amount of clearance required in here, and you can get that same amount of clearance with a tall derrick without having it slanted so much forward.

The Court: This is a replica now of what device?

The Witness: This is, I think, a very good representation of the patent that the suit is about.

The Court: Except that the patent teaches only one hydraulic ram and this teaches two, is that it?

The Witness: Well, I think, if I am not mistaken I believe that it says in the patent two hydraulic rams, one on either side.

The Court: I may be in error.

Mr. Subkow: There are two hydraulic rams, your Honor.

The Court: The Figure shows only one.

(Testimony of John Francis Purdum.)

Mr. Subkow: Figure 1. Figure 10 shows the two.

The Court: Very well.

The Witness: Now, if you will notice——

The Court: As now erected does this fairly depict the patent in suit?

Mr. Subkow: Indeed not. It is ridiculous.

Q. (By Mr. Kenway): Now, Mr. Purdum, would you make whatever arrangements or rearrangements you feel are necessary to represent the defendants' units, drive-in units which you have seen?

The Court: Can you identify them by some way, Clipper so and so? Or what model it is?

The Witness: Yes, sir, I can identify—and if you will pardon me just one second, I'll put the hinge point out, move the driver back and erect the derrick again.

Mr. Subkow: Your Honor, I apologize. I withdraw the term "ridiculous."

The Court: Do you want to substitute another adjective?

Mr. Subkow: None at all, your Honor.

The Witness: Now, this is the Clipper unit—very close.

The Court: The defendants unit, is that it?

The Witness: Yes, sir.

The Court: All right. Now, tell me in some well chosen words the difference between it and the plaintiffs' unit.

The Witness: The difference, in my interpretation is [338] that the hinge point is now no longer above the driver.

(Testimony of John Francis Purdum.)

The Court: It's in front of the driver.

The Witness: It's to the extreme front end of the unit. As shown here, these legs do extend down here. But in the unit that is manufactured by Cabot Shops the legs don't come down here. They terminate in a brace coming out to the front legs on both sides.

Mr. Kenway: Will you show his Honor what you mean by that?

The Witness: This is the particular unit——

The Court: "This" being what exhibit?

Mr. Kenway: That's going to be an exhibit of ours, but he offered it. That's the '57 catalog.

Mr. Subkow: May we not show his Honor an exhibit which shows the derrick in erect position. I offer you the exhibits that we have.

The Court: Exhibits which?

Mr. Subkow: 93, 94 and 95.

The Court: The drawings we were discussing yesterday about the forces?

Mr. Subkow: Yes.

The Witness: Is it clear so far, sir?

The Court: Does the defendants' device have that outrigger support?

The Witness: Yes. It has the outrigger support.

The Court: Is that on the rear leg?

The Witness: The outrigger support—actually there are no rear legs on the defendants' machine. But they do come from somewhere in the vicinity of the hinge point.

The Court: Are you suggesting that the legs

(Testimony of John Francis Purdum.)

closest to the cab are supported by the top of the cab alone?

The Witness: No, sir. I didn't want to put some permanent members in here. But in the defendants' unit there is cross members and a very substantial brace actually in front of the cab.

The Court: Well, how does it reach the ground, through the chassis?

The Witness: No, sir. The load is transferred to the front legs, what little load there is, at this point here.

The Court: By a cross-brace.

The Witness: By a diagonal brace, yes, sir. In fact, in construction there are diagonal braces in each section.

The Court: Of the defendants'?

The Witness: Yes, sir. And of most of the others that I have seen, to transfer the load to the front leg that takes most of the load.

The Court: Does the patent in suit teach that?

The Witness: I think there is nothing said about it, no, sir.

Mr. Subkow: I can't hear what is being said, your Honor. [340]

Mr. Kenway: I show you a photograph which will be identified——

The Court: Do you wish some of it read back?

Mr. Subkow: I have lost the last three or four questions.

May I have them, your Honor?

The Court: Please read it, Mr. Reporter.

(Testimony of John Francis Purdum.)

(Record read.)

Q. (By Mr. Kenway): I show you two photographs, one of which is identified and will be offered as Defendants' F, and the other will be offered as Defendants' Exhibit AB. And I ask whether——

The Court: Perhaps we can stipulate and get them in evidence, now. There are three photographs, A, B and F. Have you seen them?

Mr. Subkow: I haven't seen them.

The Court: They are all exhibits of the Moon deposition, apparently.

Mr. Kenway: No, sir. F was——

Mr. Subkow: Well, if I can look at them.

The Court: I am looking at the defendants' exhibit list. It says that A is Exhibit 1 in the deposition, and B is Exhibit 2.

Mr. Kenway: I said AB. This is our Exhibit AB.

The Court: I am sorry. [341]

Mr. Kenway: And that was not in the Moon deposition. However, photograph F was Exhibit 6 in the Moon deposition—attached as Exhibit F.

The Court: Very well.

Mr. Subkow: No objection to Exhibit F.

The Court: Very well. Exhibit F is received in evidence.

(The exhibit referred to marked Defendants' Exhibit F, was received in evidence.)

The Court: Exhibit AB, is it stipulated that that photograph fairly depicts what it purports to depict, the Franks accused unit, "Slide-A-Cab Forward," according to defendants' list.

(Testimony of John Francis Purdum.)

Mr. Subkow: No objection.

The Court: Is that AB?

Mr. Kenway: AB, your Honor.

The Court: Received in evidence.

(The exhibit referred to, marked Defendants' Exhibit AB, was received in evidence.)

[See Book of Exhibits.]

Q. (By Mr. Kenway): Do these two photographs demonstrate the bracing at the front of the Franks unit? A. Yes.

Mr. Subkow: Objection on the ground that it's indefinite. There are several different types of Franks units. May it be further clarified as to whether it applies to all of [342] them or only some of them?

The Witness: It applies particularly to the Clipper unit that I saw in the yard here in California just the other day.

Mr. Subkow: There are four different kinds of Clipper units, your Honor.

The Witness: It was a Senior Clipper 65.

The Court: Is that the accused device?

Mr. Subkow: There are four different units that are accused: the Midget Clipper, Senior Clipper, Super Senior Clipper and the Giant Clipper, all of which are in the evidence which your Honor hasn't seen.

The Court: The witness now says, as I understand it, that the photograph AB depicts the Senior Clipper. Is that correct?

(Testimony of John Francis Purdum.)

The Witness: Yes, sir. Showing the outrigger or side brace that you asked about, your Honor.

The Court: Very well.

Mr. Clerk, do you have them?

(Whereupon the exhibits were handed to the court.)

The Court: I assume these cross braces do not—or lateral braces do not obstruct the driver's view.

The Witness: Well, I think they do.

The Court: My assumption is erroneous. It looks to me from looking at the photograph as if they do, but — [343]

The Witness: Well, I think they do. Obviously there is some obstruction by the two or three members that are at the side and the front of the cab.

The Court: That is, this outrigging equipment.

The Witness: Well, that and the cross bracing that supports the pivot. And if you will, your Honor, right up at the top is shown the pivot point on one side, on the near side of the derrick.

The Court: That's the hinge.

The Witness: That's the hinge or pivot point. And the brace that comes down at an angle just behind that headlight is one of the supporting members; and the diagonal braces that come into a center point in about the middle of the cab are other braces that are built in front of the cab to support the derrick.

Mr. Kenway: Since I propose to have the witness change the model to a different condition, perhaps it would be proper to have Mr. Subkow ask

(Testimony of John Francis Purdum.)

any questions he may wish to about the model as he sees it now.

Mr. Subkow: I prefer that the direct examination be completed, and then I will cross examine.

Mr. Kenway: Very well.

Q. (By Mr. Kenway): Mr. Purdum, can you now rearrange the model, demonstrating a back-in unit? And will you please say, as you do so, what changes you are making? [344]

A. In order to make this represent a back-in unit I will just take the driver's position and the engine and interchange them. I will put the driver now somewhere in what was the rear of the—we will make that the front. The engine then will be on this end.

That is a back-in unit. And I might call attention to the fact that in this particular instance the engine is also in the back. If it were a semi-trailer the driver would be up in front and also the engine would be in front, with the power unit possibly amidship driving the hoist.

The Court: By the "power unit" are you referring to the engine?

The Witness: Yes, sir. I am sorry. But there are instances when more than one engine is used on all of these machines. In other words, when they are being used for a drilling machine as a rotary rig, then you must have a pump and an engine, also, in addition to this equipment to circulate the drilling fluid. And I am in the habit of talking about the power unit. But I mean the engine. In this case it

(Testimony of John Francis Purdum.)

would be the engine that drives the hoist, as well as the engine that drives the conveyance from one location to the other. [345]

Q. But in respect to that engine, Mr. Purdum, in the rig as you have it there now, if it is not a trailer rig in the back-in types with which you are familiar, where would the engine be for driving the truck?

A. If it were a back-in type, the engine would be in front with the driver, that is, it would be more or less of a conventional cab and engine, designed just like the front end of a large truck.

Your Honor, did you——

The Court: You will have to speak up so that the reporter can hear you.

The Witness: I am not sure that I answered your question about the outrigger. If I didn't, I would be happy to.

The Court: Yes, I think you have.

Q. (By Mr. Kenway): I asked you previously some questions about publications that appeared in 1947. Since Mr. Subkow has graciously waived your qualifications, I didn't get into it, but in 1947 had you had any experience with this sort of equipment?

A. Yes, I had had at least 15 years experience with oil field type of equipment, in not only the design, but also in research, finding out what equipment should do, and, among the other things that I worked on was a hoisting equipment, derricks, portable masts, and items that we are talking about here. In fact, I was with Stanolind for three [346]

(Testimony of John Francis Purdum.)

years. I organized their equipment engineering department, and for that length of time there was very little equipment purchased where I didn't look over the specifications, and in many cases had certain things done to it before we could use it satisfactorily.

Q. What, if any, relationship do you have to the defendant, Cabot Shops?

A. None at all. I am a consulting engineer and offer my services in the areas that I feel specially qualified.

Mr. Subkow: We raise no question of bias or interest. There has been no showing that any of the testimony given in this courtroom has not been truthful.

The Court: Very well.

Mr. Kenway: Thank you, Mr. Subkow. No further questions.

Mr. Subkow: Just a moment. Just leave the exhibits there, please, Mr. Purdum.

The Witness: Let me move it forward, though.

Mr. Subkow: We will relieve Mr. Crowley.

The Witness: That is what I had in mind.

Mr. Crowley: Thank you, Mr. Subkow.

Mr. Subkow: Shall I proceed, your Honor?

The Court: Yes. [347]

Cross Examination

Q. (By Mr. Subkow): Mr. Purdum, viewing the model in the aspect in which it is at present, as a petroleum engineer and with your experience in

(Testimony of John Francis Purdum.)

the oil field business, would you say that the arrangement as it is shown there would be one which would be tolerated in the oil fields?

The Court: As a back-in unit?

Mr. Subkow: In the orientation which he has it, with the driver in front and with the engine in back positioned adjacent the derrick.

The Court: The so-called back-in model?

Mr. Subkow: Which he has called the back-in model.

The Witness: I would say that there would be one very undesirable feature if the equipment were made in this manner, which I mentioned before, and normally the engine would be up with the driver in the front end of the truck on a back-in unit. But if this were a gasoline engine, or an engine that did have a spark of some kind, a magneto, it would be quite undesirable.

Q. (By Mr. Subkow): It is a fire hazard, isn't it?

A. Yes.

The Court: The question is, as between the man with the drive-in, and the man who had this one, the man who had it with the back-in, who would get the business—— [348]

The Witness: Well, I think——

The Court: ——with the same rates and the same service, who would get the business?

The Witness: I think that I would have to qualify that, your Honor, and answer that in this way: With the engine up in front where the driver is, and where he would normally be, then it is prob-

(Testimony of John Francis Purdum.)

lematical. I wouldn't know which one. I know that they are both in service. I have seen them both in service recently, and I think probably there would be some other consideration.

Mr. Subkow: Your Honor, we have a witness here that we would like to put on out of order, who also has other business. It is a short examination. I wondered if we could interrupt the testimony, the cross examination of Mr. Purdum.

Mr. Kenway: Oh, yes, as far as I am concerned.

The Court: You may.

The Witness: I believe I had better lay this down.

Mr. Subkow: Yes. We will resume at the point where we left off here.

The Court: As I understand your last answer, it is that so long as the engine is adjacent the well, why, either device would function equally well; is that it?

The Witness: Yes, sir, in that there would be either friendship, or some difference in price, or something else [349] that would govern the selection of the equipment.

(Witness temporarily excused.)

Mr. Subkow: I will call Mr. Smyser. I don't know whether this is rebuttal, in view of the way that the case has come in, perhaps it may be a re-opening of the direct. We will see as the testimony goes in, if your Honor believes it should be one or the other.

The Court: Then suppose we call it a reopening of the case in chief.

Mr. Subkow: Yes, your Honor.

CLIFFORD SMYSER

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Clifford Smyser, S-m-y-s-e-r.

The Clerk: Thank you.

Direct Examination

Q. (By Mr. Subkow): Mr. Smyser, will you tell us what your occupation is?

A. I am a general partner of the Best Well Service. We are located in Fillmore.

Q. What sort of service do you offer? [350]

A. We do oil well servicing, and water well servicing, and remedial work, and we once drilled an oil well.

The Court: You don't do that any more?

The Witness: No.

The Court: You just clean them out after other people drill them; is that it?

The Witness: Yes, that's right.

Q. (By Mr. Subkow): How long have you been in that business? A. Three years.

Q. What sort of units do you operate?

A. We have two self-propelled drive-in units. One Ideco and one Wagner-Morehouse.

(Testimony of Clifford Smyser.)

Mr. Subkow: May I have the Ideco and the Wagner-Morehouse catalogs, please?

The Court: Those are both, as I recall the record now, built by licensees of the patentee?

Mr. Subkow: Yes, sir.

The Court: Of the patent in suit?

Mr. Subkow: Yes. Exhibit 51 is the Ideco unit, and the Wagner-Morehouse is Exhibit 53.

Q. Are these units shown in their catalogs, and I now hand you the catalogs?

The Court: Exhibits——

Mr. Subkow: 51 and 53. [351]

The Court: Can you direct the witness to the page?

Mr. Subkow: May I approach the witness?

The Court: Yes, you may.

Mr. Subkow: I call your attention to page 2711 of Exhibit 51.

The Court: That is Ideco?

Mr. Subkow: The Ideco, and page 5309 of Exhibit 53, the Wagner-Morehouse.

Q. Are they similar to those two types?

A. Yes, these are essentially our two rigs.

The Court: I didn't get the page number of the Wagner-Morehouse.

Mr. Subkow: The Wagner-Morehouse is at page 5309.

The Court: Of Exhibit 53?

Mr. Subkow: Yes.

The Court: I have it now. Thank you.

Q. (By Mr. Subkow): Prior to your going

(Testimony of Clifford Smyser.)

into the business of servicing wells with the Wagner-Morehouse and Ideco rigs, what other business did you have?

A. I was a salesman for Ideco for ten years prior to that.

Q. And at that time what were you selling?

A. I was selling Ideco rigs of all sorts; drilling rigs, well servicing rigs, and other equipment.

Q. That included back-in Ideco units? [352]

A. Yes.

Q. There are two types of Ideco units sold of the back-in type, are there not?

A. There are several types that have been sold.

Q. Do they sell the truck-mounted unit?

A. Yes, they do.

Q. Do they sell the trailer-mounted unit?

A. Yes, sir.

Q. Would you tell the court the difference between a truck-mounted unit and a trailer-mounted unit?

A. Well, the difference is—well, there are many differences.

Mr. Subkow: The question is highly indefinite, and I withdraw it.

Q. Will you turn to page 2709, and will you identify the kind of a back-in unit, that is, as to whether that is a truck-mounted or a trailer-mounted rig?

The Court: You are referring to Exhibit 51?

Mr. Subkow: Exhibit 51, page 2709, the left-hand structure.

(Testimony of Clifford Smyser.)

The Witness: This is a truck-mounted back-in unit.

Mr. Subkow: It is mounted on the truck which carries the power and the mast together on the truck?

The Witness: Yes, that's right.

The Court: That is called a truck Rambler; is that it? [253]

Mr. Subkow: His Honor asked whether it is called a truck Rambler rig.

The Witness: Yes, it is.

Q. (By Mr. Subkow): Now, I call your attention to page 2713 of the same Exhibit 51, and ask you to identify the structure shown on the right-hand photograph.

The Court: At the top?

Mr. Subkow: At the top.

The Witness: Well, this a trailer-mounted—half of a mast—a trailer and a mast and the sub-structure part of a dual trailer rig. I don't think that would even enter into this. This is not a Rambler rig.

Q. (By Mr. Subkow): But it is a back-in?

A. This does not happen to be a back-in.

Q. Well, can you find a back-in unit in the exhibit?

A. Yes. I am not entirely familiar with this one here.

Mr. Subkow: Let me have the Hopper catalog.

The Court: A back-in with a trailer?

(Testimony of Clifford Smyser.)

Mr. Subkow: A truck and trailer one. Perhaps my associates will help me.

The Court: Does that make any difference? It is just a question of being able to separate the power unit from the rear end, isn't it?

Mr. Subkow: That is right. Your Honor obviously—well, [354] here is one of the Hopper Machine Company.

Q. I show you Exhibit 47, and refer you to page 2369, the lower view. I withdraw that. Here is another one: The Wagner-Morehouse catalog, Exhibit 53, which your Honor has, at page 5311, the lower figure, can you identify what that represents, and are you familiar with that structure?

A. Yes, that is a semi-trailer-mounted well servicing rig. [355]

Q. On that structure there is a separate truck portion with its own motive power, and then on the trailer there is the winch and its own motive power for raising the derrick, is that correct?

A. Yes, that is correct.

The Court: In other words, with one of those you could take the truck, or tractor part, the motive power unit and drive it away from the well and use it for something else and leave the mast and derrick at the well.

Mr. Subkow: On 5310 there is an illustration of just that situation.

The Court: Yes. I see it. With the derrick in place.

Mr. Subkow: With the derrick in place.

(Testimony of Clifford Smyser.)

Q. (By Mr. Subkow): Now, you have sold units of the back-in truck and trailer type and of the truck type in the past? A. Yes, I have.

Q. Have you had any experience with those, or have you observed them being used and driven into the location, and employed?

A. Yes, many times.

Q. Can you tell the court how the truck-type unit is backed in and what, if there are any, problems, what there are, and then if you will——

A. Well, it would depend entirely upon the location [356] in which the oil well was located. Sometimes they are in very difficult locations, and it's extremely hard to back a unit in.

I observed the General Petroleum putting one of their semi back-in units into a location in Bakersfield.

Q. You mean semi-trailer?

A. Yes. Semi-trailer mounted unit. And it took them an hour and a half, and they had to tear down a section of fence in order to get into it, because they just simply couldn't negotiate the turns handily. It was just very difficult to do.

In the first place, most of the men that drive these units are not truck drivers. They are oil field trained men, and the handling of vehicles is more or less secondary with them. They do learn it and sometimes become quite skillful, but they are not generally as handy with them as truck drivers.

(Testimony of Clifford Smyser.)

Q. When did you first hear of the Moon drive-in, Waldrip drive-in structure?

A. Well, I don't remember exactly when the first time was. But I know I saw the first one that came in the field within three days after it was in there. I didn't see it in the shop being built. But I saw it shortly thereafter with a delegation of Ideco engineers.

Q. To your knowledge, do you know whether this unit caused any interest in the field? [357]

A. Yes, it did. It caused a great deal of interest. And Ideco went through several preliminary surveys and spent a considerable amount of money deciding whether or not we should build a unit of that type. And I was against it, because I was selling so many back-in semi-trailer units, which we already had designed, and we had it to a point where we were making some money on it. And I didn't think that the drive-in unit would be as easy to get onto a location as would be a semi because you can jack-knife a semi-trailer into a location, and that should make it easier.

I changed my mind later on.

Q. I was going to ask you why you chose a drive-in unit when you went into business yourself.

A. Well, it's like many things. We have an opinion one time and then we change it. And I admit that I was wrong, and very wrong, as a matter of fact.

Q. How do you make out in competition with back-in units in the business?

(Testimony of Clifford Smyser.)

A. They can't compete with us. We have revolutionized the business in the area where we are located, which is the toughest in California. You fellows—people——

The Court: Where is that?

The Witness: Fillmore.

The Court: Fillmore?

The Witness: We operate within 50 miles of Fillmore. [358]

The Court: What fields would that be?

The Witness: Well, South Mountain, West Mountain, Torrey Mountain—the Ventura area. It's all in the mountains—very rough terrain; narrow roads and roads that have been built with bulldozers.

Q. (By Mr. Subkow): Do you have any trouble getting up there to the location?

A. No, we have no trouble, generally speaking. We can move into Torrey Mountain in an hour, and formerly it was taking at least two and a half hours, because they had to have a helper tractor to get up Torrey Mountain.

Q. What kind of a rig are you talking about?

A. With a back-in semi-trailer rig. It's the only kind they could use in that area. They couldn't use a truck-mounted rig on the deeper wells.

Q. They had to have an extra truck?

A. They had to have extra help to get the rig up the hill, where we drive to it handily. There is no problem whatever.

(Testimony of Clifford Smyser.)

As a matter of fact, we can outrun—most times we can outrun trucks going up the hill. We have to make sure that the road is clear ahead because we don't like to stop those rigs.

Q. Once you get on the location how fast can you spot your drive-in? [359]

A. Well, consistently we will put the rig on the location in 20 minutes' time; sometimes we can do it faster.

Q. Do you have any interest or connection with the plaintiffs in this lawsuit? A. No.

Mr. Subkow: That is all, your Honor.

The Court: Any cross examination?

Cross Examination

Q. (By Mr. Kenway): Your experience is limited to the California fields?

A. I have been in other fields on observation trips with Ideco; never having worked there, however.

Mr. Kenway: That is all.

Mr. Subkow: That is all, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Subkow: I wonder, your Honor, if we couldn't end the session now and resume tomorrow morning?

The Court: Yes.

When do you estimate the defendant will conclude his presentation of evidence?

Mr. Kenway: I think in about half an hour after we get started.

Mr. Subkow: We should be finished in the morning. [360]

The Court: Do you wish to resume at 9:30 or 10:00 o'clock.

Mr. Kenway: We are at your convenience, your Honor.

Mr. Subkow: Would 10:00 o'clock be adequate?

The Court: Suppose we say 10:00 o'clock. If we have a prospect of finishing——

Mr. Subkow: Well, certainly tomorrow should end it.

The Court: Very well. The trial will be recessed until 10:00 o'clock tomorrow morning.

(Whereupon, a recess was taken until 10:00 o'clock a.m. of the following day, Friday, March 28, 1958.) [361]

Friday, March 28, 1958, 10:00 a.m.

The Court: Are you ready to proceed in the case on trial, gentlemen?

Mr. Subkow: Yes, your Honor, ready for the plaintiff.

Your Honor, there are a few formal matters dealing with the exhibits that we wish to take up and clarify the record.

We have now found a photograph, Exhibit 12, and we wish the photograph replaced for the print that has been in the record, and that the markings on the print be transferred to the photograph.

The Court: We will leave that to the clerk?

Mr. Subkow: If the clerk may do so, or we will do it for the clerk.

The Court: Suppose you do it for the clerk, and when you have completed it, the substitution will be made.

Mr. Subkow: Yes. We have found the confusion in Exhibit 88. 88 in the record originally was a photograph. We have in our Woody exhibit list another Exhibit 88.

I wish to have the exhibit originally marked 88 and introduced into the record earlier in the proceedings remarked as Exhibit 106, and that all further references to 88 be read as 106.

The Court: Is that agreed to? [365]

Mr. Kenway: Yes, your Honor.

The Court: So ordered.

Mr. Subkow: This is now 106.

The Court: Exhibit 106?

Mr. Subkow: Yes, that is now 106.

The Court: 106 is a photograph, is it?

Mr. Subkow: Yes, sir. Your Honor, we find in going through the record that Exhibit 57, which is the reduced print, is the exact photograph with numbers quite small because of the reduction. We have remarked a like exhibit with larger numbers, so that they are legible. We would like either to introduce this as Exhibit 57-A, or substitute it for Exhibit 57, so that it can be read.

The Court: Is there any objection to the substitution?

Mr. Kenway: No, your Honor.

The Court: So ordered.

Mr. Subkow: Now, your Honor, in the pretrial conference order and in the answers to the interrogatories, and the deposition of Mr. Moon, there is a reference to a drive-in pole type unit. Without the exhibit, the description is a little vague.

We wish to introduce in evidence a Cooper catalog, 1957 catalog, which shows on page 39-D in the upper right-hand corner—will you hand that to his Honor—the drive-in pole type unit which is referred to, and it is marked, “Used [366] since 1918.”

The Court: Any objection?

Mr. Kenway: I have no objection, but I think that for the sake of order it may be said that is the unit which Mr. Moon was speaking of on page 10 of his deposition.

Mr. Subkow: If that is the page, yes.

The Court: You wish this marked as an exhibit, do you?

Mr. Subkow: As Exhibit 107, your Honor.

The Court: It may be so marked and received in evidence.

(The document referred to was marked Plaintiffs' Exhibit 107, and received in evidence.)

Mr. Kenway: I believe Mr. Purdum was under cross examination.

Mr. Subkow: That is right.

JOHN FRANCIS PURDUM

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Subkow): Mr. Purdom, will you take up Exhibits M and N? Have you them before you

A. I don't happen to have them here.

(The documents referred to were placed before the witness.) [367]

Mr. Subkow: And will the clerk please hand them to his Honor?

The Witness: I have them now, yes.

Mr. Subkow: Has your Honor a copy of the exhibits?

The Clerk: The witness has the original exhibits.

Mr. Subkow: Then, your Honor, perhaps you will use mine.

(Thereupon a set of exhibits was handed to the court.)

Mr. Subkow: May I look at them? They are very poor reproductions. I think these two are better (handing documents to the court).

The Court: Very well. You may return those to Mr. Lyon. [368]

Q. (By Mr. Subkow): Mr. Purdom, you stated in your evidence that you read the drawing to show two hoist drums, isn't that correct?

A. Yes, sir.

Q. Is that because you believe that one need not

(Testimony of John Francis Purdum.)

be told that there is a hoist drum in a vehicle since it is a portable servicing rig?

A. I don't believe I understood you, Mr. Subkow.

Q. Do you answer in that way because you believe that one need not be told that there is a hoist drum in the vehicle since it is a portable servicing rig?

A. Well, not necessarily. There have been many servicing rigs made with one drum.

Q. Well, you would think there would be at least one drum, anyhow.

A. Well, there must be a drum if it is going to be a servicing rig.

Q. You also say that the derrick is of welded construction. What in the drawing shows it to be of welded construction?

A. Well, there are no gusset plates shown so that it could be bolted together. And that is the principal reason that I interpret it to be welded.

Q. Do you read it that way because you know from the prior art that such constructions are welded? [369]

A. Well, I will have to admit that I have never seen a portable mast that was completely bolted together of this construction; but it could be bolted together. But I think it was welded.

Q. Because that is the way they are made in the prior art, isn't it, sir?

A. Yes. I think some of them—in fact, I think all of them are welded.

(Testimony of John Francis Purdum.)

Q. Now, you state that you see a hinge and that the vertical black line that runs up the side of the cab is the support for the hinge. Is that correct?

A. Well, I am not sure just exactly how I worded that, but I don't know definitely that the vertical black line is the support but if I remember what I said, I said that there must be a support underneath that pivot point, as the structure of the cab alone would be insufficient to carry that tremendous weight.

Q. Therefore, you draw your conclusion that it must be a support from your knowledge of the prior art that in order to hinge the derrick you must supply a hinge support, is that right?

A. Well, I don't know that it's from the prior art. It's just because I know that you have to support any sort of a structure if you are going to keep it in a fixed position. [370]

Q. That's the knowledge you bring to this reading of this drawing from your past experience with structures of hinged derricks, is that correct?

A. My past experience enables me to interpret this drawing in that manner.

Q. Is your testimony that the derrick is hinged dependent upon your reading of the drawing that the lower end of the derrick is wider than the transverse extent of the cab?

A. I was just testifying from the drawing alone, and I wasn't looking at the description matter at the time.

(Testimony of John Francis Purdum.)

Mr. Subkow: Will you read my question to the witness, please?

(Question read.)

The Witness: The answer would be no.

Q. (By Mr. Subkow): What is it based upon?

A. It's based upon the construction as shown in this drawing.

Q. Will you tell us what construction in the drawing permits you to read that the derrick is hinged?

A. I can see light through at every point excepting right below the point that I indicated as the hinge.

Q. Would that be consistent also with a structure there to merely support the derrick so it can just rest on it?

A. Well, yes, conceivably it could be. But with the [371] rotating member as shown where it is there is no other place for this structure to pivot.

Q. What rotating member, when you say—

A. The hydraulic ram that I testified to that is hinged at the bottom of the chassis, or near the bottom of the chassis, and also on the leg of the derrick.

Q. Therefore, I understand your testimony to be that you have read a hinge into the structure because you see something that you interpret to be a hydraulic jack which pivots at the lower end of the jack and thus would rotate the derrick around a hinge? A. Yes.

Q. So that you have had to read into the struc-

(Testimony of John Francis Purdum.)

ture—you would have to read into the structure elements, that is structural elements to complete that function? In other words, you will have to say, “Well, that jack, in order to rotate it about the hinge, has to be extended down and be pivoted at the lower end”?

A. That is correct; just the same as it must have an engine and at least one drum in order to function as a well-servicing rig.

Q. And you would come to that conclusion because you have seen other such structures used in the prior art for the rotation of hinged derricks, is that right?

A. Well, it's sure that I have seen that method used [372] in rotating hinged derricks prior. And that may be a factor, drawing on my experience, that that would be the way it would be constructed.

Q. Now, Mr. Purdum, don't you think it's a fair statement that, taking that drawing and reading it, you have read into it not only what there is in it but what your experience and knowledge with the prior art would supply to that drawing to supplement what is not there?

A. I believe it would be a little difficult to separate the knowledge that one has from, on from the other. I imagine that I did draw on some of the things that I know to be mechanical expedients and ordinarily used in machine design.

The Court: If you had seen this when it was first published, is it your belief that your testimony would be the same as it is today?

(Testimony of John Francis Purdum.)

The Witness: Yes, sir, I believe so, because I had been selecting equipment—in fact, most of my experience, or a lot of it, had to do with analyzing the equipment that different companies put out for certain purposes in order for me to recommend whether we could use that equipment for what we had in mind. And I am sure that I would have read the drawing in the same manner—well, at any time.

Mr. Subkow: That is all, your Honor.

Just a minute, your Honor. That is all on those exhibits. [373]

The Court: Have you finished with Mr. Purdum?

Mr. Subkow: No. I have a couple more things to ask. May I collect my thoughts?

The Court: Yes.

Mr. Subkow: In order to refresh the witness' recollection in connection with that model, I will read the end of the examination at the time we terminated at the last session, and we can pick up at that point. I believe that was when interrupted to put on Mr. Groner. [374]

Q. (By Mr. Subkow): At the end of the cross examination of the witness, and before we interrupted it to put Mr. Smyser on, you will recall we were discussing the model in the posture that it is now before you, and I asked you:

“Mr. Purdum, viewing the model in the aspect in which it is at present, as a petroleum engineer and with your experience in the oil field business, would say that the arrangement as it is shown there would

(Testimony of John Francis Purdum.)

be one which would be tolerated in the oil fields?"

And the court stated, "As a back-in unit?"

And I continued, "In the orientation which he has it, with the driver in front and with the engine in back positioned adjacent the derrick."

And the court said, "The so-called back-in model?"

And I continued, "Which he has called the back-in model."

And then you answered, "I would say that there would be one very undesirable feature if the equipment were made in this manner, which I mentioned before, and normally the engine would be up with the driver in the front end of the truck on a back-in unit. But if this were a gasoline engine, or an engine that did have a spark of some kind, a magneto, it would be quite undesirable."

You recall that testimony? [375]

A. Yes, that is correct.

Q. Now, the court then asked you the question: "as between the man with the drive-in, and the man who had this one, the man who had it with the back-in, who would get the business?"

Mr. Subkow: Now, we were talking about this construction, I believe, am I correct, your Honor? The construction in the posture in which he has it?

The Court: Yes, as between the two devices, and otherwise the same.

Mr. Subkow: Your Honor, as is shown with the cab in front and the engine in the back?

The Court: As I understand it, the witness

(Testimony of John Francis Purdum.)

stated that if the engine of the back-in were in front, away from the well, it would not matter.

The Witness: That is what I intended to say, and I believe in there I put that modification in. Didn't I, Mr. Subkow?

Q. (By Mr. Subkow): So you didn't intend to imply, then, that the conversion of this unit by taking the cab from the front and putting it in another place, and then interchanging things so as to put the cab in the back had any material relationship to the issues in this case, then?

A. Well, yes, it does have.

Mr. Kenway: I object, your Honor. [376]

The Witness: Oh, pardon me.

Mr. Kenway: That is asking for a legal conclusion.

The Court: Sustained. As I understand the witness, the only disadvantage, as he sees it, to a back-in over a drive-in, so-called, is if the engine is in the rear of the back-in, it would create a fire hazard at the well, but that normally, as I understand it, he would say that in the back-in units the motive power is up where the driver is, and not back.

Mr. Subkow: I think your Honor has this thing clearly in mind, and I will discontinue with it.

The Court: Any redirect?

Mr. Subkow: Just a moment.

The Court: Oh, I am sorry.

Mr. Subkow: I have some notes here I would like to look at.

Q. Now, Mr. Purdum, you didn't intend this

(Testimony of John Francis Purdum.)

model to illustrate a structure which had any utility as a portable servicing oil well rig?

A. You mean something that could actually work?

Q. It doesn't really represent, and it doesn't have the structural features that are necessary in a unit of this kind to serve as a drilling and servicing rig? It is merely——

A. It is a model that I think has the features as shown in the back-in units and in the front-in units that this [377] case is about, but I mentioned, for instance, the rams. They are long, and they are non-operative, but to indicate just the fact that the derrick was raised with a hydraulic lift mechanism.

Then the little block here is not one suitable for actual work, because it is from an awning, but I thought it looked pretty good, and pretty well represented what was in the drawings or the pictures of a traveling block in a unit.

I think the features are here, although the construction,—as I also mentioned, the derrick is only in one piece. The cost of making a two-piece derrick, and of handling it is quite out of proportion to the value.

I thought with this model, although I admit it isn't very pretty, but it does have the features that I thought were being talked about.

Q. Do I understand that the answer to my question is "Yes"? A. Would you please——

The Court: With that explanation of it?

(Testimony of John Francis Purdum.)

The Witness: I might be able to say yes, if I could have the question again.

Mr. Subkow: Please read the question.

The Court: You also mentioned that the model, as I recall, omits the cross braces? [378]

The Witness: Yes, sir. And, in addition, your Honor, I have a screw here that has no function at all, only to slide the derrick legs at this pivot point here. I can run them up and down, and that isn't in a derrick in use.

So I would say that this is not a functional miniature well servicing derrick.

Mr. Subkow: Will you read the question to the witness again, Miss Reporter? He wishes to see whether he can answer "Yes."

(The question referred to was read by the reporter as follows: "Q. It doesn't really represent, and it doesn't have the structural features that are necessary in a unit of this kind to serve as a drilling and servicing rig? It is merely——")

Q. (By Mr. Subkow): Omitting "It is merely," is the answer to the question "Yes" or "No"?

A. Structural features,—now, I take that to mean if it would actually hold up a certain load. I would say that that is a "Yes," qualified to the extent that there is no guy wires shown, and it would surely have to be guyed, and the rear legs here do not touch the ground, and they would have to—for stability in raising and lowering the der-

(Testimony of John Francis Purdum.)

rick, there would need to be something done in that area. So I would say the answer was "Yes." [379]

Q. Mr. Purdum, are you telling the court that you would design and construct a servicing rig in which the derrick is positioned on the hinge support, on the roof of the member there, without any cross members or supporting structures to support it?

A. His Honor asked me about that, and I specified before that I didn't want to put some permanent members in the front portion, and that they wouldn't need to be there.

Q. Then you were imagining that they would be there, weren't you?

A. I constructed the model here so that I could move the pivot point back and forth, and so I could place the driver's position as shown and described in the patent in question, directly above the driver's position, so I could move it out in front of the cab.

I made the top of the unit strong enough in this model so that it adequately supports the structure that I have it supporting at the moment. The cab is not the structure. This (indicating) is the cab, or a representation of it with the man inside.

Q. All right. Put it in front, Mr. Purdum, and is that the way you can see it in relationship?

A. It is just a little cramped here.

Q. Now, Mr. Purdum, with that thing there, will you please listen to the question and see whether you can answer [380] it "Yes" or "No."

(Testimony of John Francis Purdum.)

(The question referred to was read as follows: "Q. Mr. Purdum, are you telling the court that you would design and construct a servicing rig in which the derrick is positioned on the hinge support, on the roof of the member there, without any cross members or supporting structure to support it?")

A. The answer is "No," that I would have—that when I design a structure, I design into it the adequate supports to the points——

Q. Therefore, there would have to be cross bracing to run from the hinge point down to the chassis, wouldn't there? You are imagining that?

A. Well, I think it is—I really don't understand your question, Mr. Subkow.

Q. What confuses you, Mr. Purdum? I am asking you whether or not you omitted these strut and supporting structures merely for simplification, and that you would understand that they would be there?

A. I omitted them so that I could slide the cab in and out to comply with both of the patents that had been mentioned at that time.

Mr. Subkow: Mr. Purdum, I don't want to argue with you, but I think I am entitled to an answer to the question.

The Court: Hasn't he answered it? He has answered it [381] to my satisfaction.

Mr. Subkow: Has he? All right.

The Court: I don't know how else he could answer it.

(Testimony of John Francis Purdum.)

Mr. Subkow: Then I will assume the answer by my next question.

Q. With such supporting structures present, could the wheels be turned? Could you drive the structure, would you say?

The Court: Which supporting structure, now?

Mr. Subkow: That is the difficulty, your Honor. I didn't get the answer to my question. If the answer to my question had come in——

The Court: He told me he built the member to where the rear legs are supported by the wheels of the vehicle. [382]

Mr. Subkow: Well, he just said he wouldn't design a structure of that kind and that he imagined the structure to be there and he omitted it because he wanted to slide the cab.

The Court: Why don't you put another question. I think we understand it.

Mr. Subkow: The purpose of this examination is so that the court would understand it. If it does, I don't want to pursue it.

The Court: Well, I take it that this is a rough model. It isn't accurate in detail. And pages have been consumed here saying wherein it isn't accurate in detail.

You wouldn't question that, would you?

The Witness: No, sir.

Mr. Subkow: That satisfies me.

The Witness: And I might further state from the evidence here, that is from looking at the model

(Testimony of John Francis Purdum.)

I think you will agree that I am not a model maker. But it does have the features——

Mr. Subkow: Mr. Purdum, I think it's a pretty model.

The Court: You wouldn't expect anyone to copy it, would you?

The Witness: No. We will have no infringement suit on this here.

The Court: You brought it here without fear that anyone [383] would make another one like it?

The Witness: Yes.

Mr. Subkow: And I don't think that it will sell as a toy, Mr. Purdum, really.

The Court: Any redirect examination?

Mr. Kenway: No, your Honor.

The Court: You may step down, Mr. Purdum.

The Witness: Thank you, sir.

Shall I move this?

Mr. Kenway: We are through with the model.

The Court: You may leave it there.

The Witness: I believe I will lay it down just in case someone would bump against it.

(Witness excused.)

Mr. Kenway: I will call Mr. Woody.

WAYLAND B. WOODY

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Wayland B. Woody.

Direct Examination

Q. (By Mr. Kenway): Mr. Woody, how are you employed? [384] A. Pardon?

Q. What is your employment? What is your job?

A. I am at present chief development engineer for Cabot Shops.

Q. In connection with that work have you come into contact with portable well servicing equipment? A. For 20 some years.

Q. And you were formerly vice-president of Franks Manufacturing Company?

A. That is correct.

Q. What were your duties at Franks Manufacturing Company?

A. My principal duties were the design and development of oil field equipment of all the types that we manufactured.

Q. Have you figures available to show for 1956 the breakdown on sales of the different types of portable servicing and drilling equipment which the company manufactures? A. I do have.

Q. Have you them with you right now?

A. By memory. I can quote them, I think.

(Testimony of Wayland B. Woody.)

Q. All right. Would you tell us, please, those figures?

A. In 1956 we produced a total of 120 units, of which 84 were truck-mounted units with pole masts; 32 were truck-mounted units with derricks, and the remainder was of the [385] drive-in type or, I think maybe there was a special skid unit or unit of other type. At any rate, of the total production of 120 units, there was 84 plus 32, which would be 116, that were truck-mounted back-in units.

The Court: With derricks on them?

The Witness: 84 of them had pole masts.

The Court: What is a pole mast for?

The Witness: A pole mast performs the same function as a derrick.

The Court: Used with oil wells?

The Witness: To service oil wells. It performs the same function in a little different way, and it is less expensive in initial cost. And since a great deal of the remedial work in the oil fields since the war is done by private contractors, there has been a trend toward lower original investment.

The Court: Where are these manufactured?

The Witness: They were manufactured in Tulsa, Oklahoma up until last September. And the manufacturing operation has been transferred to Pampa, Texas.

Q. (By Mr. Kenway): Would you look at Exhibit 54, please?

(Whereupon the exhibit was placed before the witness.)

(Testimony of Wayland B. Woody.)

Q. (By Mr. Kenway): By referring to the pages of the catalog you have, would you tell the court, going through somewhat rapidly, beginning at page 1883 what kind of a unit [386] that is?

A. That is a drive-in unit.

Q. And on the next page?

A. That's another type of drive-in unit.

Q. And on the next page?

A. That is a drive-in unit.

Q. Now, turn to page 1889.

A. That's a back-in unit. It's a truck mounted unit with a derrick or mast on it.

Q. And on the next two pages there are——

A. Similar.

Q. Then, if you will turn, please, to page 1900.

A. That is a back-in unit with a pole mast on it.

Q. And the next several pages show similar types? A. The same.

The Court: What is the difference in price between the unit with the pole mast and one with the derrick, approximately?

The Witness: I couldn't give you exact figures, but I would say that the best way to express it would be in percentage, and that the difference might run as much as 25 per cent more.

The Court: What is this Giant Clipper, what does it sell for, about? I don't care to have it to the penny. I am not going to buy one. I just want to know. [387]

The Witness: Oh, with full equipment it will run possibly as much as \$90,000.

(Testimony of Wayland B. Woody.)

The Court: And the cheapest one would run——

The Witness: Of the normal size of these pole mast units they will run around \$30,000.

Q. (By Mr. Kenway): Now, the figures you have given us are for 1956. I am correct, am I not, in assuming you do not have yet complete figures for 1957? A. That is correct.

Q. But without going there into specific figures, could you tell the court whether your sales experience during 1957 differed materially from the ratio of sales of the different units from what it was in 1956?

A. There is no significant change. There doubtless will be, in the final analysis, changes in the ratio of the various units. But that exists from year to year, even though there is no over-all trend.

Q. How about 1955?

A. '55 was probably very nearly the same.

Mr. Kenway: Your witness.

Mr. Subkow: No cross examination.

The Court: You may step down, Mr. Woody.

(Witness excused.)

The Court: Your next witness?

Mr. Kenway: That concludes my witnesses. But I do [388] have some exhibits to put in, your Honor.

The Court: Very well. Do you wish to take a recess while you organize them?

Mr. Kenway: I don't think it will take me that long, sir.

All right. Why don't we then. Five minutes would be sufficient.

(Short recess.)

Mr. Kenway: May it please the court, we do not intend to offer Exhibits A and B on our list because they have already been put in as plaintiffs' exhibits.

The Court: What exhibit numbers are they?

Mr. Kenway: Our Exhibit A was the patent in suit, which is Plaintiffs' Exhibit 1. Our Exhibit B was the 1957 Franks catalog, which is Plaintiffs' Exhibit 54.

The Court: Very well. Are you going to offer Exhibit C?

Mr. Kenway: I am offering Exhibits C, D and E, which are three photographs which were exhibits at the deposition of Mr. Moon.

The Court: Any objection?

Mr. Subkow: No objection to those.

The Court: Received in evidence.

(The exhibits referred to, marked Defendants' Exhibits C, D and E, were received in evidence.) [389]

Mr. Kenway: Exhibits F, G and H are already in evidence.

I am not offering Exhibit I, the Waldrip Wild Catter, since that is also an exhibit of the plaintiff, Exhibit No. 41.

I do offer in evidence Exhibit J, the Wilson catalog, which was Exhibit 10 at the deposition of Mr. Moon.

Mr. Subkow: We never have been able to obtain

a copy of that catalog. You promised to supply me with one and I haven't anything to work with on it. Is there any chance of my being able to see that?

Mr. Kenway: The only one we have is that one. Perhaps I can explain its purpose, the purpose for which it is offered. That was offered merely to show that pole mast units are still currently being sold. That is the single purpose for which it was offered. [390]

Mr. Subkow: To avoid the necessity of the exhibit, we will stipulate that pole mast units are still being made.

Mr. Kenway: In that event, I will withdraw Exhibit J.

The Court: According to Mr. Woody, they are very much being sold. Then Exhibit J is not offered?

Mr. Kenway: No. Our Exhibit K was Exhibit 11 to the deposition of Mr. Moon, and that is the McEwen patent, and since that is also incorporated in our Exhibit T-1, I will not offer it again.

The Court: Very well.

Mr. Kenway: Our Exhibit L was Exhibit 12 to the Moon deposition, and that was one of the license agreements which has been offered in evidence by the plaintiffs, and I can't say which one it was, because the name of the licensee was removed.

Mr. Subkow: On what issue is that exhibit being offered?

Mr. Kenway: I am not offering it.

Mr. Subkow: Oh, I am sorry.

The Court: Is it in evidence as a plaintiffs' exhibit?

Mr. Kenway: It is. They introduced several license agreements.

Mr. Subkow: No, these were not introduced.

The Court: I didn't recall any.

Mr. Kenway: Oh, thank you. In that case I do offer Exhibit L, which was Exhibit 12 in the Moon deposition. [391]

Mr. Subkow: And I ask upon what issue is it being offered?

Mr. Kenway: That shows the background on which this litigation is standing.

Mr. Subkow: I still ask to what issue is it being directed?

The Court: There was testimony in your case in chief that certain licenses are extant in this matter.

Mr. Subkow: And this is to show what that license is?

Mr. Kenway: Yes.

Mr. Subkow: I withdraw the objection.

The Court: Very well. Exhibit L is received in evidence.

(The exhibit heretofore marked Defendants' Exhibit L was received in evidence.)

The Court: That covers everything down to V, does it not?

Mr. Kenway: Yes, sir.

Mr. Subkow: Your Honor, may we have this understanding, that the introduction of that exhibit raises no issues not specified in the pretrial conference order?

The Court: That is the exhibit——

Mr. Subkow: L.

The Court: ——L, the license agreement?

Mr. Subkow: Yes. [392]

Mr. Kenway: That is agreeable.

The Court: Very well.

Mr. Kenway: I am not offering Exhibit V.

The Court: W?

Mr. Kenway: W is now in evidence, your Honor, as an exhibit of the plaintiffs. That was Exhibit 33 in the deposition of Mr. Woody, and has been offered as Plaintiffs' Exhibit 35.

The Court: Very well. Exhibit X is the model, and that is in evidence.

Mr. Kenway: Yes, sir. I offer in evidence the photograph, Exhibit Y.

The Court: Any objection?

Mr. Subkow: May I see it? We have a number of photographs which are not identified by number. Can somebody tell me what it is?

The Court: It says, "Franks Pole Mast Unit."

Mr. Kenway: I believe it is on the rear side of those, Mr. Subkow.

Mr. Subkow: I have got his list.

The Court: It is listed as a photograph.

Mr. Subkow: Yes, I have it. Now, what is the offer?

The Court: It is offered in evidence.

Mr. Subkow: As showing what?

Mr. Kenway: Oh, it shows six pole mast units, I believe. [393]

Mr. Subkow: Yes, but what materiality has it?

When were these pole mast units constructed, and when was the photograph taken?

Mr. Kenway: That, again, is simply offered to show that pole mast units are still apparently being sold.

Mr. Subkow: Then we need no such exhibit, because we have stipulated to that.

The Court: It is here, and it might help someone to visualize it, unless there is some prejudice.

Mr. Subkow: No, I can't see any prejudice. Maybe I am mistaken, but I don't see any.

The Court: Received in evidence as Exhibit Y.

(The exhibit heretofore marked Defendant's Exhibit Y was received in evidence.)

Mr. Kenway: I will not offer Exhibit Z, but I shall offer in evidence Exhibit AA as a photograph of one of the defendants' current units.

Mr. Subkow: May we have a stipulation that this photograph shows the Franks drive-in unit with the derrick erected and extended?

Mr. Kenway: Certainly.

The Court: Received in evidence as Exhibit AA.

(The exhibit heretofore marked Defendants' Exhibit AA was received in evidence.) [394]

The Court: AB is already in evidence, according to my notes.

Mr. Kenway: Yes, sir, and I will offer at this time Exhibit AC, which is a photograph showing one of the defendants' units with the derrick erected, and specifically showing the framework at the lower end of the derrick in relation to the front end of the unit.

Mr. Subkow: Just a minute. AC?

Mr. Kenway: Yes.

Mr. Subkow: I have no such exhibit. I have no such photograph. May I hear that offer?

The Court: It is offered in evidence.

Mr. Subkow: As showing something.

The Court: As showing, according to the defendants' list, and you can read it, the Franks accused unit, the side of the cab forward.

Mr. Subkow: There was some additional statement Mr. Kenway made to further explain the exhibit, and may it be read to me, your Honor?

The Court: Yes, sir.

(The statement referred to was read.)

Mr. Subkow: No objection.

The Court: Received in evidence. [395]

(The exhibit heretofore marked Defendants' Exhibit AC was received in evidence.)

Mr. Kenway: I shall not offer Exhibits AD or AE, but I do offer in evidence Exhibit AF, which is a photograph of the forward end of one of the defendants' units with the derrick erected.

Mr. Subkow: Is that AF or FF?

Mr. Kenway: Well, FF became AF. That is the new notation.

Mr. Subkow: No objection.

The Court: Received in evidence.

(The exhibit heretofore marked Defendants' Exhibit AF was received in evidence.)

Mr. Kenway: Now, I offer in evidence Exhibit AG, which is a photograph of one of the defendants' units with the derrick partially erected.

The Court: Any objection?

Mr. Subkow: May we have this unit identified by reference to the trade designation, so that we may know?

Mr. Kenway: That is a Clipper.

Mr. Woody: That is the unit illustrated on page 1884 of the 1957 catalog, substantially the same model.

The Court: What is that exhibit?

Mr. Woody: Exhibit 54.

The Court: What do you call the unit?

Mr. Woody: It is a Senior Clipper, I believe, the present designation. In here it is designated as the Super [396] Senior Clipper.

The Court: Any objection to the offer?

Mr. Subkow: No objection.

The Court: Received in evidence.

(The exhibit heretofore marked Defendants' Exhibit AG was received in evidence.)

Mr. Kenway: Now, I offer in evidence Defendants' Exhibit AH, which is a photograph of one of the defendants' units bogged down at the side of the road.

You don't have a copy of that, Mr. Subkow, and neither do I.

The Court: Any objection? It is bogged down at the side of the road. You won't object to that, will you?

Mr. Subkow: Not a bogged down unit.

The Court: Received in evidence.

(The exhibit heretofore marked Defendants' Exhibit AH was received in evidence.)

Mr. Kenway: I shall not offer in evidence Exhibits AI or AJ.

The Court: Does that conclude the list?

Mr. Kenway: Yes, sir. The defense rests.

The Court: Any rebuttal?

Mr. Subkow: Yes, your Honor. We would like to call Mr. Hopper to the stand.

The Court: Recalled? [397]

Mr. Subkow: No, sir. This is in rebuttal.

The Court: But he is recalled. He has been called once before.

Mr. Subkow: Yes, but not for the plaintiffs, your Honor. He was called by the defendants.

The Court: Very well.

The Clerk: He was sworn, though.

Mr. Subkow: He was sworn, yes, sir.

FRANK A. HOPPER, JR.

called as a witness by the plaintiffs in rebuttal, having been previously duly sworn, testified further as follows:

The Clerk: Will you state your name for the record?

The Witness: Frank A. Hopper, Jr.

The Court: And you have heretofore been sworn, Mr. Hopper?

The Witness: Yes.

Direct Examination

Q. (By Mr. Subkow): Your catalog has been introduced in evidence in this lawsuit as Exhibit 47, and I hand you the catalog, and ask you to

(Testimony of Frank A. Hopper, Jr.)

turn to page 2367, and this illustrates the drive-in unit manufactured and sold by your company; is that correct? A. Yes, sir. [398]

Q. How long have you been manufacturing that drive-in unit?

A. As my memory serves me, since about 1952.

Mr. Subkow: Your Honor, may I look at that catalog over the shoulder of the witness?

The Court: You may have this one.

(The document was handed to counsel.)

Mr. Subkow: Thank you, your Honor.

The Court: How much do they sell for, Mr. Hopper, about?

The Witness: Well, it varies. Really, there are four basic models, your Honor, and we will take the smallest to the largest. The smallest sells around to forty to forty-five, and the largest for a little over one hundred thousand.

Q. (By Mr. Subkow): Now, Mr. Hopper, you also manufacture back-in units. Will you turn to page 2369, and the lower type is the trailer-mounted unit, is that correct, and the upper type the G-hoist? A. Yes, sir.

Q. You also sell such units mounted on trucks?

A. Yes, this Figure 2 is a typical truck-mounted unit.

Q. That is a pole mast. Do you have one with a derrick mounted on it? Do you sell them with a derrick mounted on it?

A. Yes. I think there is one designated here some place. [399]

(Testimony of Frank A. Hopper, Jr.)

Q. I think you will find one at page 2363.

A. That's right. Figure 6 on page 2363 is a truck-mounted unit with a derrick, which is a short derrick, and handles singles.

Q. Now, you also have these derricks mounted on skids, do you not?

A. Skid-mounted units, yes.

Q. Do you have any shown there?

A. No, I don't think it is depicted in the catalog.

Q. Will you tell his Honor what a skid-mounted unit is?

A. Well, a skid-mounted unit, in essence, is a rig with no method of transportation as a part of the unit. You pick it up with a truck crane, and load it on a semi-trailer, and handle your transportation in that manner.

The Court: And skid it into position; is that it?

The Witness: That's right. That is where the term came from.

Q. (By Mr. Subkow): Now, can you state the relative percentages of drive-in units to the back-in units of the truck type, and the back-in units of the trailer-mounted type and skid type that you sell in California?

A. Well, the drive-in type in California probably accounts for, roughly, 80 per cent of our business in California. [400]

Q. And taking it over the whole country, what would be the ratio of the sales of your drive-in type to all the three different types we are talking about?

(Testimony of Frank A. Hopper, Jr.)

A. I would estimate that within the last two fiscal years, it is about 50 per cent. In other words, about 50 per cent of what we sell is in this drive-in category, and the balance is in truck-mounted and semi-trailer and miscellaneous type units.

Mr. Subkow: Thank you. That is all. [401]

The Court: Do you attribute the popularity of the drive-in model to the convenience of the driver in locating the derrick, spotting the derrick?

The Witness: Well, that is a factor. You go a little deeper into it, your Honor. The cost of labor in California is higher than it is, generally we'll say, in the mid-continent area; and as a result, the purchasers of equipment can and do spend more money for what we loosely term as "gadgets" and basic labor-saving devices.

The Court: Is the drive-in a labor-saving device over the back-in, appreciably?

The Witness: It's a little faster getting in and out of location.

The Court: More versatile, shall we say?

The Witness: Well, it's not more versatile. It is easier to handle because——

The Court: It saves time?

The Witness: It saves time, and it is more simple for a truck driver or a well driver functioning as a truck driver to handle a piece of machinery that consists of one unit rather than two, in the case of semi-trailer mounted equipment.

The Court: And it doesn't require as much skill

(Testimony of Frank A. Hopper, Jr.)

to drive it in forward as it does to back it up to the location, is that it? [402]

The Witness: That's right.

The Court: Anything further of this witness?

Mr. Kenway: No. Thank you.

The Court: You may step down, Mr. Hopper.

(Witness excused.)

Mr. Subkow: I would like to recall Mr. Moon for one or two questions.

The Court: Is there any occasion to require the further attendance of Mr. Hopper? If not, he is excused.

Mr. Subkow: As far as I am concerned he may be excused.

The Court: Very well.

Mr. Subkow: Mr. Moon, would you take the stand, please?

CLEON JAMES MOON

a witness called on behalf of the plaintiffs in rebuttal, having been previously sworn, testified as follows:

The Court: You are the plaintiff and you have been sworn?

The Witness: That's correct.

The Clerk: State your name for the record, please.

The Witness: James Moon.

Direct Examination

Q. (By Mr. Subkow): Mr. Moon, you were present at the taking of the [403] deposition of

(Testimony of Cleon James Moon.)

Mr. Woody and heard the testimony there given, were you not? A. Yes, sir.

Q. You have read the Woody deposition, and have you studied the exhibits which form part of the Woody deposition? A. Yes.

Q. Have you inspected the actual Franks drive-in units?

A. Yes. I have inspected at least three separate models of them.

The Court: Can you identify those by their trade name?

The Witness: Yes. I saw the very first one in California, which I believe they call their Giant. And I saw the Senior that Terminal Drilling has.

And I saw another one at the Oil Show in Tulsa. And I believe that unit was a Super Senior. I could be mistaken about that, but I believe that was the model.

The Court: The Clipper series?

The Witness: That is the Clipper series.

Q. (By Mr. Subkow): Now, you have also studied the exhibits, the charts that we have here, Exhibits 93, I think, and 94 and 95. As a matter of fact, you testified with regard to one of them.

Yes, Exhibits 93, 94 and 95.

A. Yes. I have studied those charts, and I worked in conjunction with Mr. Wagner in supervising the draftsman that [404] prepared the charts.

Q. Are they a fair representation of the structure of the Clippers that you have seen?

(Testimony of Cleon James Moon.)

A. In a structural sense, yes. And in a general sense, yes.

Q. With that information before you, will you compare the structure of the Clipper units with the structure disclosed in your patent?

A. They are substantially the same structure, producing the same result in substantially the same way.

Mr. Subkow: That is all, your Honor.

Mr. Kenway: No questions.

The Court: No questions?

Mr. Kenway: No, your Honor.

The Court: Very well. You may step down, Mr. Moon.

(Witness excused.)

The Court: Any further rebuttal?

Mr. Subkow: We have one witness on the patents that were experted by the defendants. May I inquire whether in presenting only these three patents the defendants withdraw all the other patents that were offered in that book S?

The Court: You mean Exhibit S.

Mr. Subkow: Yes.

Mr. Kenway: No. They are in the record, and we feel free to comment on them if we wish to.

The Court: The three, as I understand it, that were adverted to are their best foot forward.

Mr. Subkow: I see. Well, I would like to have a witness on the stand to explain the patents a little more fully than they have been, your Honor.

The Court: Very well.

Mr. Subkow: Mr. Bayliss, will you take the stand, please?

May I borrow an Evans patent?

The Court: You will be using Exhibit S?

BENJAMIN PHILIP BAYLISS

called as a witness on behalf of the plaintiffs in rebuttal, being first sworn, was examined and testified as follows:

The Court: Mr. Clerk, before you swear a witness, wait until everyone in the courtroom is giving attention. Don't swear a witness while other things are going on.

The Clerk: Thank you, your Honor.

Mr. Subkow: Has your Honor a copy of that patent before him?

The Court: No. Is that in Exhibit S?

Mr. Subkow: Exhibit S.

The Court: May I see Exhibit S, a book of prior patents, Mr. Clerk?

(Whereupon the exhibit was given to the court.) [406]

Direct Examination

Q. (By Mr. Subkow): Mr. Bayliss, you have studied the Morton patent, 966,345?

A. Yes, sir.

Q. Will you tell the court what the—will you turn to Figure 10?

Mr. Subkow: Your Honor, forgive me. I overlooked qualification of the witness. I am getting a little tired, I am afraid.

(Testimony of Benjamin Philip Bayliss.)

Q. (By Mr. Subkow): Mr. Bayliss, will you tell us your education and experience?

A. Well, I am a mechanical engineering graduate of Ohio State University; following which I went to work for Shell Oil Company in their mechanical engineering division. And my work in that connection involved the—I was assigned to the drilling department of Shell, during the early period when Shell was emphasizing the design of the light weight 100 per cent portable rotary drilling equipment. And in that connection I worked for two and a half years, part of this time in the Franks Manufacturing plant in Tulsa, observing the design and manufacture of the first one of these portable rigs.

Then after a period in the war I came to California and went to work for the Western Oil Tool & Engineering Co. [407] under Mr. Moon and Mr. Wagner, which later became the engineering department of the Waldrip Engineering Company in Hollydale. There we worked on the design of portable self-propelled drilling and servicing rigs and pumping units, oil well pumping units.

Following that I became employed by the Lloyd Corporation of Beverly Hills, an oil well drilling and producing company. And I am in their employ at the present time.

Q. Now, let us revert to the patent. Let us look at Figure 10——

The Court: Of the Morton patent?

(Testimony of Benjamin Philip Bayliss.)

Q. (By Mr. Subkow): —of the Morton patent, 966,345.

Will you tell us where the structure which extends upward at an angle is hinged to the remaining structure?

A. The structure is hinged along what would be called the chassis, the front end of the chassis of this fire-fighting vehicle. And on a horizontal level with that chassis.

It's an unnumbered pivot or hinge point, and shown in a dashed manner—dotted.

Q. Is it shown anywhere else in the figure?

A. Not in Figure 10.

Q. In any other figure?

A. Oh, yes. It is shown in Figure 2, also dashed. And having read the specification I know that the hinge pin is numbered 48, although it isn't numbered on Figure 2. [408]

Q. Is it numbered up any other place?

A. Yes. Figure 24 calls out the hinge, in the lower right-hand portion of 24, Figure 24, and the hinge assembly is Nos. 47 and 48.

Q. Where does the driver sit?

A. Referring to Figure 2, the driver sits above the hinge in the front, on top of the front part of the vehicle at No. 400 on Figure 2.

Q. Now——

A. His position—may I go on?

Q. Yes.

A. The driver's position is described on page

(Testimony of Benjamin Philip Bayliss.)

9 of the specifications, column 1, commencing about line 58. I will read from that.

“The platforms 80 are made movable on the ladders to enable them to be moved back so as to clear the driver’s seat 400 and not interfere with the driver. The driver’s seat 400 and footboard are rigidly attached to the extensible support and move down in front of the vehicle when the said support is elevated.”

Q. The structure which rotates the ladder, or whatever it is that extends at an angle in Figure 10, is caused by what sort of an element?

A. Well, there is provided in this apparatus an air [409] receiver 199.

Q. Where is that?

A. The hydraulic ram 195, which in turn is below the so-called chassis of this apparatus.

That air receiver works to actuate a hydraulic—an air pump which motivates the hydraulic motor, which moves a piston in the cylinder 195 to thereby erect the derrick assembly by means of an inter-connected strut 50.

Q. The strut being connected to what?

A. The strut at its upper end is connected to a gusset 29 shown in Figure 2, allowing the derrick to rotate on its hinge pin 48.

Q. And the lower end of the strut 50?

A. The lower end of the strut 50 is connected to the hydraulic cylinder 195.

Q. What does 51 show?

A. On Figure 2?

(Testimony of Benjamin Philip Bayliss.)

Q. On Figure 4.

A. Oh, that's the slidable assembly. [410]

Q. So that do I understand that the hydraulic cylinder pushes the cross head 51 to the right through the guide way 52, and thus rotates the structure around the hinge pin 40?

A. Yes, except that it pushes it to the left in that view in Figure 2 to rotate it.

Q. I was looking at Figure 4. I am sorry. In Figure 4 it shows it?

A. In Figure 4 it is reversed, so it pushes it to the right, that is correct.

Q. Now, is this structure, except for the fact that this cross head 51, moves this connecting hydraulic cylinder, similar to any structure with which you are familiar in connection with your back-in units?

A. Yes, I would say that it is similar to the Franks screw type raising mechanism, in that it has the cross head and slidable pin.

Q. Would a structure of that kind be adaptable for use in a drive-in unit, such as illustrated in the Moon patent?

A. No, it couldn't be adapted to the drive-in type for the same reason that the screw type raising mechanism couldn't, and that was the lack of space at the front end of the unit. That is what caused us in the Moon design at Waldrip to change from a screw type mechanism, and use instead an extendable hydraulic jack. [411]

Q. Now, turning to the Downie patent, that is

(Testimony of Benjamin Philip Bayliss.)

1,096,022—the second patent in the book, your Honor—can you tell me whether this is a self-propelled unit with an engine which drives the wheels mounted on the structure?

A. There is no motive power built into this unit, no means of moving it by its own power.

Q. There is no driver's position, is there?

A. There is no driver, and no driver's position.

Q. What kind of a derrick structure does it have? Does it have a four-legged derrick?

A. As shown in Figure 1, and also in Figures 4 and 6, the derrick structure consists of two legs, and these are referred to as No. 13 in both Figure 1, Figure 4 and Figure 6.

Q. Now, will you turn to the Evans patent, Mr. Bayliss.

A. May I make one comment on this Downie patent?

Q. Certainly.

A. That if it were to be converted by any means into a powered drive-in unit, there would be no room to place the driver in his position, and the motive power and the derrick erecting mechanism in the front of the vehicle, because all of that space at present is used up by the spudding drive mechanism, as shown in all the detail in the front end of Figure 1.

The Court: You mean that boiler? [412]

The Witness: No, the other end, sir. It would have to be placed there—you see, here is the well head (indicating), if it were a drive-in unit.

(Testimony of Benjamin Philip Bayliss.)

The Court: Oh, for a drive-in unit?

The Witness: Yes, if it were a drive-in unit, this would all have to be removed.

Mr. Subkow: Is that all, your Honor? Does your Honor want to ask any more?

The Court: No, that is all I have.

Q. (By Mr. Subkow): Now, turn to the Evans patent, please.

A. I don't have a copy of the Evans patent.

Q. No. 2,488,180. I will give you the book so kindly loaned us by the defendants, and it is the last patent in the book.

(The book was handed to the witness.)

The Court: The last patent in Exhibit S, isn't it?

Mr. Subkow: Yes, your Honor. May I have a moment, your Honor?

The Court: Yes.

Q. (By Mr. Subkow): Will you turn in the Evans patent to Figure 1, or, turn to Figure 10, and will you state where the driver's position is with respect to the front or the rear of the vehicle?

A. Well, this vehicle has a very short wheelbase, [413] and the driver's position appears to be central, almost immediately between the front and rear wheels.

The Court: Is that his seat at 14?

The Witness: 14 is the seat, and 16 is his steering apparatus, so he occupies most of the space between the wheels.

Q. (By Mr. Subkow): What is this device?

(Testimony of Benjamin Philip Bayliss.)

A. I think the common term for it is a fork lift truck. It is called "Mobile Hoisting and Conveying Apparatus" in this.

Mr. Subkow: Your Honor is fully familiar with a fork lift truck, I am sure.

The Court: Is that the type of thing that they use down at the docks and in warehouses?

The Witness: Yes, sir, that is correct, and it picks up on a slat various loads and moves them from one position to another.

The Court: I think they use them around the airports, too, don't they?

The Witness: They do.

Q. (By Mr. Subkow): Where is the hoist position?

A. The hoist is in the front of the—oh, the hoist. The hoisting reel No. 35 is positioned below and in front of the driver's position.

Q. Now, is there any mechanism for erecting the— [414] I will withdraw that.

You will notice that the dotted position of the mast, in that it is hinged around 19,—you see that?

A. Yes, sir.

Q. How is that lifted up and erected?

A. I believe that is 119, isn't it?

Q. 119. I am sorry.

A. That is done manually, since in the specification there is no provision made for erecting it by any mechanical means.

Q. These are very light equipment, are they not?

(Testimony of Benjamin Philip Bayliss.)

A. Yes, that is light enough to be pushed up and down by hand, although it is bigger than the wooden model that was up here.

Q. I must apologize for this question. Could such a structure be used for any oil well servicing operation around an oil well?

A. No, this unit is designed for an entirely different function, and could not be so used without completely changing its character.

Mr. Subkow: That is all, your Honor, with this witness.

Mr. Kenway: No cross examination.

The Court: You may step down, Mr. Bayliss, and you are excused.

(Witness excused.) [415]

The Court: Any further rebuttal?

Mr. Subkow: I believe that closes it. It is very close to 12:00 o'clock and could I think about it over the noon hour? It will be very short.

The Court: We have already marked your list of exhibits as Exhibit 99, have we?

Mr. Subkow: Yes, your Honor.

The Court: Have we marked the defendants' list of exhibits as an exhibit?

Mr. Kenway: No, your Honor. I hadn't intended to offer it in evidence. I will be glad to.

The Court: You may substitute a corrected up-to-date version, if you like.

Mr. Kenway: Thank you, your Honor.

The Court: And it might be helpful. It will be Defendants' Exhibit AK.

Mr. Kenway: AK.

(The document referred to was marked Defendants' Exhibit AK, and received in evidence.)

The Court: The clerk will file for the plaintiffs as Exhibit 99 whatever is your complete list, that you may serve and file, of the exhibits, Mr. Subkow.

Mr. Subkow: I am sorry. My mind was wandering.

The Court: I say the clerk will receive and file as [416] Plaintiffs' Exhibit 99 a corrected and up-to-date list of exhibits.

Mr. Subkow: Thank you. We will supply such a list.

The Court: And, of course, you will serve it on the other side.

Mr. Subkow: Certainly.

The Court: And likewise the clerk will receive and file as Defendants' Exhibit AK an up-to-date, complete list of the defendants' exhibits.

Mr. Subkow: May I inquire, your Honor, and I think inquiry was made before, as to whether you will want to hear oral argument on this?

The Court: I like to hear oral argument in these cases.

Mr. Subkow: I know you do, and it is important. I would like a little time to organize my thinking for the presentation of this.

The Court: Would you prefer not to do it this afternoon?

Mr. Subkow: I would prefer not to do it this afternoon.

Mr. Kenway: If your Honor please, as you know, we are here from Boston, and it is Friday. I was very hopeful that we could finish today.

The Court: I couldn't hear it at all next week, gentlemen. I will be in Washington most of next week.

Mr. Kenway: It seems too bad to have to make a trip [417] across the country again.

The Court: Then let's hear your argument this afternoon, if you wish.

Mr. Kenway: Thank you, sir.

Mr. Lyon: May I inquire if the clerk's record shows that Exhibit U was received in evidence?

The Clerk: Yes.

Mr. Subkow: Then I will not be required to make my argument?

The Court: No, you won't need to, but let's hear what Mr. Kenway wants to say before he goes back to Boston, and not compel him to come back again.

Mr. Subkow: Of course, we wouldn't want to do that.

The Court: Then, 2:00 o'clock. We will recess until 2:00 o'clock.

(Whereupon at 11:52 o'clock a.m., an adjournment was taken until 2:00 o'clock p.m. of the same date.) [418]

Friday, March 28, 1958. 2:00 p.m.

The Court: You may proceed, gentlemen.

Mr. Kenway: Before undertaking the argument, I would like to state that Mr. Subkow has called my attention to the fact that Exhibit L, the license agreement we offered, was not up to date, and he has given me a copy of the up-to-date license, and I ask permission to substitute that for the one previously marked Exhibit L.

Mr. Subkow: No objection.

The Court: So ordered.

Mr. Lyon: Does the plaintiff rest?

Mr. Subkow: Plaintiff rests.

The Court: All the evidence is closed, as I understand it.

Mr. Kenway: Yes, your Honor.

The Court: You may proceed, Mr. Kenway.

Mr. Kenway: Thank you, sir.

Addressing myself to the issue of the validity of the patent here in suit there are three contentions which we believe are amply supported by the evidence here.

The first is that there was no invention involved in transposing old elements into a different combination. That is supported, as far as the evidence is concerned, by the plaintiff's own exhibits, such for example as shown in any [419] of the photographs of the back-in units. I have here Exhibit 16, for example, which shows the necessary elements arranged for a back-in unit.

Mr. Moon testified very honestly and candidly, and among other things he said that the derrick as shown in the McEwen patent under the same conditions of use will bear its load and do its work

just as they do in our current units. So that there is no change in the essential operation of the equipment itself as far as the derrick is concerned.

Hydraulic rams were used to erect derricks before.

The hoisting equipment has been approximately the same for years.

And the principal difference is that the engine has been shifted to the rear of the vehicle and the hinge mounting for the derrick has been advanced to the front of the vehicle. [420]

I am sure your Honor is familiar with the oft-cited A & P case, which holds that it is rather unlikely that there will be invention present when you have merely a re-shuffling of the old cards, so to speak, and I believe that it cannot be denied that here there have been no new elements, *per se*, but that it is simply a re-arrangement of the old elements.

The Court: What is the field in the pertinent prior art here? Does it cover such things as fire-fighting engine?

Mr. Kenway: Yes, it does.

The Court: As shown in the—I don't recall the name of that patent, but it is the first one in Exhibit S.

Mr. Kenway: Yes, sir, the Morton patent.

The Court: The Morton patent.

Mr. Kenway: With the telescoping tower. That is not in one sense in the same art that we are talking about here, but in another sense it is. It depends on how you define the field. If you talk

about portable telescoping units which are to be carried in a vehicle that is flat, and then erected and put in an operating position, that would speak for them.

The Court: You are arguing the question of no invention now at this point?

Mr. Kenway: Yes. I was going to take up the prior art patents later, but I would be happy to do it.

The Court: No, I should not have interposed that question [421] at this juncture.

Mr. Kenway: It is quite all right, sir.

The Court: Your first contention is that no invention is involved in the transposition of the old elements into this new combination?

Mr. Kenway: Yes, sir. And on that argument, as I stated, the only prior art I need to rely upon is our old units per se, or the old Hopper units, which were of the back-in type.

The quality of invention isn't there. There was nothing particularly ingenious or clever about it. There was no unobvious result.

Of course, it is easier to drive something head first into position, just as it is easier to drive your car into your garage head first rather than to back in.

The Court: As I understand your position, then, your contention is that all that was done here is to take the driver's head and put it under the foot of the derrick?

Mr. Kenway: In a sense, that is correct.

The Court: That he could drive into the location instead of back in?

Mr. Kenway: That is what is in common in the patent in suit and our device.

The Court: Is it contended that that is the only improvement Moon made?

Mr. Kenway: Well, in a sense this case is most peculiar [422] on that basis. When you go over the file wrapper, you will see that he came in asking for a patent for just that, that broad an idea, if you will, and his claims were directed to it, and the Examiner rejected those claims on the basis of the same argument that I have made here, that you simply reversed the cards.

They put up a strong fight, with affidavits and long arguments, trying to convince the Examiner that he should grant the patent merely on having this derrick on the front, instead of at the back, and the Examiner was adamant.

Then there were a series of interviews in the Patent Office, as a result of which the claims in suit were finally granted, and the reason they were granted, as it appears from the record, is that the Examiner said he would allow claims provided those claims specified the relationship of the legs of the derrick to the driver's position. If they straddled that driver's position when the derrick was erected, for some reason he would allow the claims.

Now, unfortunately, the record is silent as to why he felt that the addition of that limitation would carry the claims through the Patent Office.

That is why, in examining Mr. Moon, I asked

him if he had in mind that he could stick the derrick over the cab so that the operator could look up and operate the controls. [423]

The Court: Was that argument advanced to the Examiner?

Mr. Kenway: I don't know, your Honor.

The Court: I mean, does the file wrapper disclose any such argument?

Mr. Kenway: No, sir. That is pure speculation.

The Court: Have you finished on the first contention now?

Mr. Kenway: Well, we rather got sidetracked on this business of what happened in the Patent Office, your Honor, and while we are on that, this gets us into file wrapper estoppel.

The Court: We had better save that for infringement, hadn't we?

Mr. Kenway: I think that would be more orderly, yes, sir.

Now, still on this business of any unobvious results, your Honor has heard a lot of testimony with respect to the legality of the equipment, and the thrust of the plaintiffs' testimony is that you couldn't design a unit that would be legal with a back-in arrangement, but as soon as you adopted the drive-in arrangement, your troubles were over.

Unfortunately, for that argument, Mr. Hopper testified that you have legality troubles as far as the highway laws are concerned with all types of units, that it is a continuing problem, and that there has been no particularly happy solution of it.

One more point, you could probably take judicial

notice that many of the buses you see going on the street have engines in the rear. There is no particularly novel point there. And, indeed, it hasn't been claimed that that was an invention.

So, simply on the basis of not prior art in the technical sense, but the actual units that were operating in the oil fields, we contend that there is no invention. That finishes my argument on that particular phase.

Now, then, I had intended to discuss the prior patents in Exhibit S.

The Court: Is this on the second contention as to validity?

Mr. Kenway: Yes.

The Court: Is this also on the contention of want of invention?

Mr. Kenway: Yes, but phrased a little differently. Now, we are talking about prior art as shown in the patent literature, and our contention is directed to Section 103, which says that there is no invention if what was done would have been obvious to one skilled in the art at the time the invention was made.

Coming first to the Morton patent, your Honor will recall that the application for that patent was filed in 1904. And the problem which faced Mr. Morton was that of making a [425] telescoping tower which could be transported presumably from the fire house to the scene of the fire, carried horizontally through the street, and then erected into an operating position.

Perhaps the most constructive figure to start with

on Morton is Figure 10, where the telescoping tower is shown in one of its possible positions of operation, extended, hinged up from the front of the vehicle. And because it was a horse-drawn vehicle it happened that in Figure 10 they showed it as backed into the building. You might say that that's a drive-in unit backed in, perhaps.

In 1904, naturally, they didn't have reliable automotive engines so they used horses. They were still using horses when I was a boy. Certainly there could be no invention in substituting a conventional truck engine for horses.

The hinge was at the front. It used a hydraulic ram to raise it. They used a pneumatic engine to do it, which is what you would have used in 1904. Today you would use a hydraulic system with the liquid instead of the gas.

And the point of that patent is simply this: that even as long ago as 1904, when a competent engineer was presented with the same kind of basic problems here, that we have here, he solved it in the same way, as a matter of principle, that is involved in the patent here in suit. He wasn't dealing with oil well equipment, to be sure; but this is perhaps an [426] automotive, or a vehicle problem, looked at one way; and it's a combination of a vehicle and a tower or mast that you want to erect where you get when you want to use it. And your Honor may recall that Mr. Moon testified that at one time he was interested in a fire engine of some kind. So that it's no great leap from one to the other. And I think it can be argued that the problems are so similar that

it's only natural that solution to a fire engine problem might well suggest itself to someone concerned with our kind of equipment.

Moreover, your Honor will note that in Exhibit T-1, which is the book of patents relied upon by the Patent Office Examiner, that he cited hook and ladders and fire engine patents. So that in his view there was nothing wrong in opposing a patent in that particular aspect of the field to the patent in suit.

Unfortunately for us, evidently he didn't have Mr. Morton's patent at hand.

Evans is a patent, also, where he wanted to carry hoisting equipment around. If you will look at Figures 10 and 11 of that patent you will see a similar approach, where he had an engine in back and his hoisting equipment in front, and put his driver in between them. And he had a hoisting structure, a mast or derrick or crane, which he could hinge so that it would lie in horizontal position when you [427] wanted to take the vehicle over the road or around the dock, as your Honor suggested.

And here, again, I don't make any claim that this apparatus as shown in the Evans patent could be driven out to an oil field and used to pull rods and tubing. Obviously it couldn't.

The Court: You contend that this is an analogous art.

Mr. Kenway: Yes. When a problem comes, as I said you can define the art as an art which relates to portable hoisting equipment which is to be carried

on a vehicle. And in that sense Morton and Evans certainly qualify.

You can call this art strictly relating to oil field equipment, but I think that's an unnecessarily limited view, because certainly competent engineers recognize the analogy of the problems involved—many of the problems just like I was saying.

And going back to Morton for a moment, they have there a hoist on the tower so that people and equipment can be hoisted up and down and people rescued from buildings, and so forth. And there is nothing generically a mechanical principle which is different there; whether you hoist a man up and down or hoist some equipment from an oil well, you are still hoisting. And the same goes to Evans.

The Downie patent—as I stated earlier, I hadn't intended at the opening of the trial to spend much time on the [428] Downie patent because, frankly, if you look at Figure 1 it's somewhat antequated equipment in appearance.

But I was surprised to learn from Mr. Purdum that this sort of a rig is still in use today. And here we are again, application having been filed 45 years ago. They have an engine at the back to keep it away from the well head, presumably. And they have hoisting equipment at the front, and winches and so forth which drive that hoisting equipment is naturally between the engine and the hoisting equipment. And, again, for purposes of transport, the hoist or mast, whatever you wish to call it, is arranged to be hinged and drawn back flat so it is more convenient to transport it.

I see nothing peculiar to the derrick structure involved in the patent in suit which would make it fiendishly difficult to take the principles which you find in Morton, Evans and Downie and adapt them by good design engineering to the type of structure you have before you in this case.

That was all I intended to say about the prior art patents, unless your Honor has some questions on that.

The Court: As I understand it, none of the patents included in Exhibit S were cited in the Patent Office.

Mr. Kenway: That is correct. Not one of the patents cited here was before the Patent Office.

The Court: And your third contention as to validity?

Mr. Kenway: Yes, sir. Now, I move to the advertising [429] literature which was published by Waldrup more than a year before the application was filed for the patent in suit.

The Court: Before you do that, do you claim that any of these patents strictly anticipate the invention?

Mr. Kenway: No, your Honor, because I don't think in any of those patents will you find an arrangement where you have spaced front and rear legs and straddling the driver's position. So in that sense they don't anticipate it. And I say that those patents fulfill our burden under Section 103 of the statute, and to a competent engineer it would be obvious to do what was done.

So, now, proceeding to the advertisements which

were published by Waldrup in the spring of 1947. There it is our contention that under Section 102 of the Statute they do directly anticipate every material element of the patent in suit. And I wish to make it clear that we do not assert those advertisements under Section 103 as prior art. They were not. There was a considerable argument on that score advanced by Mr. Subkow in opposing our motion for summary judgment. I believe he will agree with me that we short-circuited that much of it.

The Court: You advance this prior publication contention under Section 102(b), as I understand it.

Mr. Kenway: Yes, indeed, your Honor. And under that Section if the invention had been described in a printed [430] publication more than a year before the application for patent in suit was filed, it is an absolute statutory bar—it could not have been a valid patent.

You have heard the testimony——

The Court: Now, does that mean that the precise invention must be described? In other words, what is described must be what is taught by the patent, must it not?

Mr. Kenway: Yes, your Honor. I think there perhaps the best approach is to look at Section 112 of the Patent Statute. That is the section which tells you what a patent application must do. And I would think that if it was obvious that we can apply that same test to these prior publications that we have made our case.

“The specification or application shall contain a written description of the invention * * *”

and so forth,

“* * * in such cold, clear, concise and exact terms * * *”

and now we come to the purpose of it,

“* * * as to enable any person skilled in the art to which it pertains or with which it is most nearly connected to make and use the same.”

Therefore, I say that if a person skilled in this art could read those publications and know what's there, what they mean, so that he could proceed to design a unit of that [431] kind, we have met the test. Mr. Purdum was such a person, and that was the gist of his testimony.

But in connection with Mr. Purdum we had a problem. Obviously he studied the patent in suit. And we expect the argument, as far as he is concerned, that perhaps having read the patent in suit before he saw those publications he was unconsciously reading into them not his general skill in the art, which he is entitled to read into them, but his particular skill in the art which came from reading the patent in suit.

We felt we should do something to overcome that argument, and, therefore, we put on the stand Mr. Groner, who, as Mr. Lyon said, was entirely innocent of any knowledge, not only of the patent in suit but of oil field equipment in general. He was a competent machine designer without skill in this particular art, and yet to him, I believe your Honor would agree, he came close to finding out just what was there by the drawing and by the text, and that

conveyed to him the same essential salient features of the device that we find in the patent, with relationship to the parts, the hinge, the hydraulic rams, the erection, the telescoping derrick. [432]

As far as the engine in the rear is concerned, there is no problem, and it is the text of at least one of the publications, which specifically states that the engine is in the rear, and your Honor will recall as far as Mr. Purdum is concerned, the movements told him where the engine was, so to a man skilled in the art, or indeed to someone not skilled in the art, who was a competent engineer, those things carried a message, and we contend, therefore, they do serve as a statutory bar, completely voiding the patent.

The Court: Do all of the claims of the patent in suit place the engine in the rear?

Mr. Kenway: I believe so. It is my understanding they do. They don't? I don't think that is a matter of great moment, your Honor. I know that some of the claims do. I couldn't say which do and which do not. There is in the evidence an earlier abandoned application which Mr. Moon filed, and it showed a front-end derrick, and I presume that Mr. Subkow will argue that Mr. Moon is entitled to that earlier filing date, which moves him back far enough to block out these publications, so upon that score I believe I should refer to the statute again, Section 120.

That has to do with the benefit of the filing date of an earlier application, and it gives the conditions under which the inventor is entitled to the benefit of

the earlier date, but one of the requirements is in the last two lines [433] of that section of the statute:

“and if it contains or is amended to contain a specific reference to the earlier filed application.”

Nowhere in the patent in suit is there any reference, specific or otherwise, to any other application.

Now, at the time the patent statute was passed, the application for the patent here in suit was pending in the Patent Office. It had been filed and it had not been issued, and I call your attention to the amendment, or, to the additional sections of the Patent Act of 1952, Section 4, “Time of Taking Effect,” and 4(a) reads:

“The Act shall take effect on January 1, 1953, and shall apply to all applications for patent filed on and after such date, and to all patents granted on such applications. It shall apply to further proceedings on applications pending on such date, and to patents granted on such applications, except as otherwise provided.”

So my argument is that the provisions of Section 120 were applicable to Mr. Moon’s application.

Therefore, the publications in question, Exhibits M through Q, constitute a statutory bar, resulting in the total invalidity of the patent with which we are dealing here.

So we have three grounds on which the patent is invalid: [434] That it was a mere re-arrangement of parts old and common in the art, and that the difference was obvious in view of the patents to Morton, Evans and Downie, and that in any case the

patent is void because it was described in a printed publication or publications which were before the public more than a year prior to June 28, 1948, when the patent application was filed.

That is our case on validity.

I am not quite sure whether your Honor cares to hear us on infringement. I am prepared to discuss that.

The Court: Yes, I would like to hear you.

Mr. Kenway: I would like to find a place in the file wrapper before I start. Yes, here I am.

With respect to infringement, as I said earlier, Mr. Moon came into the Patent Office asking for a patent.

The Court: Before you do that, I think it would be helpful to me if you would tell me wherein you see the accused device is different from the device of the patent in suit.

Mr. Kenway: Well, briefly, your Honor, it is this: The claims of the patent in suit in four of the five claims require—oh, for example, at the end of Claim 4:

“causing a portion of the driver’s position to be positioned between the said leg portions, said leg portions extending from said hinge to rest on the [435] ground and straddle said driver’s position with the derrick in said erect position * * *”

Your Honor will note that in the patent in suit, looking particularly at Figure 3, for example, the rear legs of the derrick come right down astride of the steering wheel, so that when you are sitting

there you have one leg right at one side of you, and one on the other, and directly overhead is that hinge on which the derrick is pivoted.

The Court: The accused device does not straddle the driver? It straddles the cab, is that it?

Mr. Kenway: Yes, sir. In all of the defendants' devices, and in the devices actually constructed by Waldrip, that hinge point was moved forward so that it was at the extreme upper front corner of the cab structure, and, therefore, the derrick was out in front of the cab and driver's position.

The Court: Completely?

Mr. Kenway: Substantially so.

The Court: Of course, in the drawing in Figure 3, I suppose it is substantially so, isn't it?

Mr. Kenway: Well, if your Honor looks at Figure 3, you will see perhaps half the cab is actually within the confines of the derrick itself.

The Court: Yes, but as long as it straddles the cab at all, wouldn't that meet the claim?

Mr. Kenway: No, sir. [436]

The Court: In order to avoid infringement on that point, wouldn't you have to be able to say you did not straddle the cab at all?

Mr. Kenway: We say in view of the file wrapper we don't straddle the cab. This is the peculiar thing. It doesn't make much sense from a common sense viewpoint, at least, it doesn't to me. I don't see much difference between——

The Court: You mean the file wrapper limits the patentee to the point where he has to say that an infringer substantially straddles the cab?

Mr. Kenway: Yes, sir, that is quite evident from the file wrapper.

The Court: And not just in a small degree, but in a large degree,—a half or better?

Mr. Kenway: Yes, sir.

The Court: Is that what you were saying?

Mr. Kenway: Yes, sir.

The Court: If only 25 per cent straddles the cab, do you say it avoids infringement?

Mr. Kenway: Well, it is difficult to draw the line.

The Court: Well, we have to draw it, don't we?

Mr. Kenway: I think we can do that.

The Court: Must we not, and isn't it absolutely imperative that we draw the line?

Mr. Kenway: Yes, sir. [437]

The Court: And unless you can say our device—the derrick in our device does not straddle the cab at all, so that we don't do that at all?

Mr. Kenway: Well, that is the case.

The Court: Then I misunderstood you. I thought you said that you did straddle it a little bit.

Mr. Kenway: No, sir, I didn't mean to say that.

The Court: Not even a tiny bit, and not at all?

Mr. Kenway: I thought you were talking about the Waldrip construction. I am sorry.

The Court: Oh, I am sorry. I probably misled you. Does the accused device straddle the cab at all?

Mr. Kenway: No, sir.

The Court: So that you say that the plaintiffs' combination is such that in order to build it as taught in the patent, the legs of the derrick do straddle the cab; is that correct?

Mr. Kenway: In order to build a unit which meets the language of the claims, you have to have that derrick straddling the cab, yes, sir.

The Court: And your answer to that, as I understand it, is even though we use the same combination, it is different to the extent that the legs of our derrick do not at all straddle the cab.

Mr. Kenway: Yes, sir. [438]

The Court: So, therefore, the claims cannot, as we say, read on our device; is that it?

Mr. Kenway: Yes, sir, that is just what we do say.

The Court: The file wrapper does not have anything to do with that, does it?

Mr. Kenway: Oh, yes, it does, your Honor.

The Court: Except as limiting the scope of the claims?

Mr. Kenway: Well, you have——

The Court: Assume there is nothing in the file wrapper, wouldn't you make the same contention?

Mr. Kenway: No, I don't think I could.

The Court: Why? Because this would be a substantial equivalent; is that it?

Mr. Kenway: Yes, precisely so. You heard Mr. Moon testify that our construction was the substantial equivalent of what is called for in the claims.

The Court: Now, you cited me to the file wrapper, pages 17 and 48 of Exhibit T.

Mr. Kenway: Yes, sir.

The Court: But while attempting to listen to the testimony, I didn't find what you had in mind, probably.

Mr. Kenway: Well, what I had in mind was this——

The Court: If we look at page 17, I did read Claim 6. Isn't that it there?

Mr. Kenway: Yes, sir. [439]

The Court: I read that claim:

"A portable drilling derrick, comprising a vehicle chassis, front and rear wheels for said chassis, the ends of the legs of said derrick protruding ahead of said front wheels and the top end of said derrick being positioned toward the rear of said chassis, a hinge on said derrick, said hinge being mounted at the front end of said chassis, and means positioned on said chassis to rotate said derrick about said hinge point to move said derrick to an erect position."

Mr. Kenway: Yes, sir.

The Court: That is the original claim 6?

Mr. Kenway: Yes, sir.

The Court: As applied for?

Mr. Kenway: Right.

The Court: Now, what happened to it?

Mr. Kenway: Well, it was cancelled. The Patent Office wouldn't give it to him.

The Court: It was rejected. Now, what did the patentee then do?

Mr. Kenway: Well, they filed several amendments and affidavits, and, finally, if you will turn over to page 48 of the file wrapper, you will see the termination or near termination of the discussion before the Examiner. [440]

The Court: There is a long document there. Now,

will you point it out? Is it on page 48 that the particular language appears?

Mr. Kenway: Yes, sir. There is a paragraph there beginning, "Remarks."

The Court: Yes.

Mr. Kenway: And it is about the third sentence in that paragraph. He acknowledges first the interview he had with the Examiner, and what they discussed.

The Court: "One of the features which the Examiner indicated as possibly carrying the claim over the then cited references was the straddling of the cab by the derrick when erected."

Mr. Kenway: Yes, sir.

The Court: (Continuing) "It is respectfully urged that the new references do not in any way meet this claim, either alone or in combination with the cited references. The additional Claims 15 to 17 are likewise patentable." Is that what you cite as the estoppel?

Mr. Kenway: Yes, sir, because those limitations do appear in the claims.

The Court: And the claims were amended to insert that limitation?

Mr. Kenway: Yes, sir, new claims were written putting in that limitation. [441]

The Court: Claim 6 on page 17 of the file wrapper, as you read it, does not embrace that aspect of it; is that correct?

Mr. Kenway: No, sir, we would infringe that claim, because the hinge could be anywhere up at the front of the chassis; but it doesn't recite the

relationship of the platform or the legs of the derrick and the driver and the hinge, and so forth. We would infringe that claim.

The Court: But your point here on the file wrapper estoppel feature, as I understand it, is that the patentee urged that point as carrying the battle of validity over the claim as originally presented?

Mr. Kenway: Yes, indeed, your Honor.

The Court: And that the claim was rewritten to—where does it appear as rewritten?

Mr. Kenway: I will say that he didn't rewrite Claim 6. That was just cancelled, and new claims were put in.

The Court: Yes, that is what I am attempting to refer to.

Mr. Kenway: Let me see here. Claim 1 of the patent in suit was, I believe, Claim 18 in the file wrapper.

The Court: Now, are you referring to the Examiner's comments on page 67, where he says:

"Upon satisfactory correction of Claims 14, 15 and 17 along the lines indicated above, such claims [442] will appear to be allowable"?

Mr. Kenway: Yes, sir.

The Court: That is at page 67.

Mr. Kenway: Unfortunately, I have a file history where the pages are different.

The Court: That is the comment or remark made on May 28, 1953.

Mr. Kenway: Yes, sir. That is on paper No. 12; is that right?

The Court: Yes, paper 12.

Mr. Kenway: You will also notice the Examiner's statement in the second paragraph of that letter, the last sentence, after objecting to the language used, where he says:

"The rear legs of the derrick, as set forth in the specification, and not the front legs as stated in line 19 of Claim 17, straddle the cab."

He pinned it right down to the particular legs.

The Court: Of the derrick which straddle the cab?

Mr. Kenway: Yes, sir.

The Court: Now, does the next document meet those objections? [443]

Mr. Kenway: Well, the argument there, he then made the changes in those claims resulting in the claims as you see them in the patent in suit.

The Court: Is the key here the location of the hinge?

Mr. Kenway: Well, they are interrelated, your Honor. If you put the hinge directly over the driver——

The Court: Yes, I know they are interrelated. But does he say in the claims where the legs will be, like the Examiner says?

Mr. Kenway: Yes. In the claims of the patent looking at Claim 1, which was Claim 18 in the——

The Court: "* * * lower rear leg portion to straddle said driver's position when the derrick is in said erect position * * *"?

Mr. Kenway: Yes, sir. Just before that he said, "The hinge, being located with respect to the longitudinal axis of said chassis to cause a portion of the

driver's position to enter said free area and the lower leg portions * * *” and so forth.

And you could see that if the hinge were directly above the driver, the rear legs would come down one on each side of him.

And then you see in the next claim, the last clause or so talks about “locating the driver's position between said leg portions with said leg portions straddling said driver's [444] position when the derrick is in said erect position.”

And then you have similar language in Claim 3 and Claim 4. It's the last few lines of each claim on which we deal here.

What we contend to be in the same concept is phrased a little differently in Claim 5, which is Claim 22 of the patent.

The Court: Do you find that in Claim 5?

Mr. Kenway: Yes. Again in the last five or six lines.

“* * * said hinge being located with respect to the longitudinal axis of said chassis locating said lower end of one pair of front and rear legs and their respective co-operating means to one side of the driver's position and the lower legs of the other pair of front and rear legs in their respective co-operating means to the other side of the said driver's position with the derrick in said erect position.”

Which is a somewhat longer way of saying “straddling.”

It would, therefore, appear that what the plaintiff is trying to do here is to recapture the ground

he gave up in the Patent Office. Indeed, he has to do that if he is going to stretch his claims to cover the defendant's structure. And that practice is explicitly condemned by the Supreme Court in *Exhibit Supply Company against Ace Patent Corporation*, 315 U. S. 126; and in this Circuit in *B & H Electric Company [445] against M. Stevens Company*, 233 F. 2d 879.

That's our case on infringement. And I would like to thank Mr. Subkow for his many courtesies. And I have enjoyed very much appearing here.

The Court: Do you wish to say anything now, Mr. Subkow?

Mr. Subkow: No, your Honor, because in presenting my argument I will have to rely to some considerable extent upon the Woody deposition. Your Honor has not yet read the Woody deposition. And my argument would be quite unintelligible without that. And I would like an opportunity to organize that so as to limit the amount of work and effort you would have to do.

The Court: Very well.

Mr. Subkow: If your Honor will be giving consideration to these matters, I suggest Exhibit 1-A would be quite helpful in considering the claims. It has analyzed the claims.

The Court: Yes. I have that here.

I shan't be giving it any consideration until after I have heard your argument.

Mr. Subkow: I suspect so. When do you want to hear argument from me?

The Court: What is that old saying that is up in

the Court of Appeals around the ceiling up there? It says, "Hear one side and all is in doubt; and hear both sides and all will be clear." [446]

I don't know about that latter one.

Mr. Subkow: I don't know. I sometimes wonder how a judge does come to his decision.

The Court: Well, it certainly isn't wise to do it after hearing only one side.

Mr. Subkow: I hope your Honor won't. I am confident of that.

The Court: I don't know. That's an old saying that probably comes from the Good Book around Deuteronomy or something. But I am not sure.

Mr. Subkow: A lot of our social philosophy comes from that, your Honor.

The Court: When would you like to do this?

Mr. Subkow: At your convenience. You will be away all next week, I understand.

The Court: From Monday on, yes.

How much time would you estimate it would take?

Mr. Subkow: Well, I undoubtedly will have something organized for your Honor, maybe in writing. I would want to read from the deposition. I would like, I think, at least two hours.

The Court: Would Monday afternoon, April 14th, be agreeable?

Mr. Subkow: Yes.

Mr. Lyon: It apparently will be necessary for me to [447] attend as these gentlemen were returning to Boston, and make whatever reply seems indi-

cated. I am going to trial before a visiting judge here on the 14th.

The Court: I could set it for Friday afternoon, April 11th on the chance that time might be available.

Mr. Subkow: Shall we set it for that date, then, and then if there is any change I suppose we will be notified in due time.

The Court: I suppose you could get excused, couldn't you, from Monday afternoon, if you can explain to the visiting judge that we don't usually try cases on Monday? Explain to him that is our law and motion day on Monday.

Mr. Lyon: I don't know. What is the name of the judge that is going to be here? It's a short name.

The Court: Judge Wham from Illinois.

Mr. Lyon: He will be trying this case. I never met him.

The Court: I am confident he will excuse you for Monday afternoon if we set this for that date.

Mr. Subkow: That would be the 14th?

The Court: That would be Monday afternoon, April 14th. I think that is better than taking a chance on Friday, because we would probably disappoint ourselves. And I am confident that Judge Wham, who is from the Southern District of Illinois will accommodate you. [448]

Mr. Lyon: I am certainly willing to try.

The Court: Who is on the other side?

Mr. Lyon: Mr. Miketta, I believe.

The Court: Can't you arrange it with him in advance, probably, and explain to the judge that we

usually set these matters on Monday? Unless it will interfere with his schedule.

How long do you estimate the case will require?

Mr. Lyon: Judge Hall sets up that calendar.

The Court: How long is it estimated the case will take?

Mr. Lyon: It's going to take about the same amount of time that this one did.

The Court: Well, I think it would be better to set it on Monday afternoon, April 14th, at 2:00 o'clock. And then if that doesn't meet with the convenience of Judge Wham, why, of course, we will continue it.

Mr. Lyon: All right.

Mr. Subkow: May we have permission to withdraw that big chart to conform our exhibit with the one that was marked?

The Court: Any objection?

Mr. Lyon: No objection.

The Court: So ordered.

Then I will continue this to April 14th at 2:00 o'clock for further oral argument.

Anything further, gentlemen? [449]

Mr. Kenway: No, your Honor.

Mr. Subkow: Thank you, your Honor.

The Court: Very well, gentlemen.

(Whereupon, a recess was taken in the above-entitled case until 2:00 o'clock p.m., Monday, April 14, 1958.) [450]

Certificate

I hereby certify that I am a duly appointed, qual-

ified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 28th day of March, 1958.

/s/ DON P. CRAM,
Official Reporter.

/s/ MARIE G. ZELLNER,
Official Reporter. [451]

[Endorsed]: Filed August 4, 1958.

PLAINTIFFS' EXHIBIT No. 98

[Title of District Court and Cause.]

DEPOSITION OF WAYLAND B. WOODY

The deposition of the witness, Mr. Wayland B. Woody, examined on behalf of the plaintiffs, pursuant to due notice, at the plant of the Franks Division, Cabot Shops, Inc., 2801 Dawson Road, Tulsa, Oklahoma, commencing at 10:00 a.m., Monday, June 24, 1957, before Garn Gordon, a certified shorthand reporter and Notary Public in and for the State of Oklahoma.

Appearances: For the plaintiffs—Mr. Philip Sub-

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)
kow, 727 West 7th Street, Los Angeles 17, California. For the defendants—Kenway, Jenney, Witter & Hildreth, by Mr. George W. Crowley, 24 School Street, Boston, Massachusetts. [1]*

Stipulations

Mr. Subkow: It is stipulated, Mr. Crowley, that this deposition is taken on notice, which has been handed to the reporter, which will be attached to the deposition, and that said notice is a due and proper notice under the Federal Rules of Civil Procedure; and I show you a letter, copy of which has been handed to the reporter, dated June 12, 1957, addressed by myself to Mr. Charles G. Lyon, attorney for the defendants, and that the same is a due and proper demand, under the Federal Rules of Civil Procedure, for the production of the documents therein listed.

Mr. Crowley: I may well go along with you, Phil, if you will concede that some of these things, which may come up as we go along, that Mr. Woody be given some opportunity to do some more digging, bearing in mind that we are going over about a twenty year period here practically.

Mr. Subkow: Yes, ample opportunity will be given to Mr. Woody to find and produce the documents.

Now, I believe it is further agreed that it would

* Page numbers appearing a top of page of Original Deposition.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

be admitted by the defendant, and the defendant waives all further proof of the following:

(a) That Franks Manufacturing Corporation was prior to the 5th day of April, 1955, an Oklahoma corporation, and had its principal offices at Tulsa, Oklahoma, and a legal and [2] established place of business in the southern district of California, from and after March 9, 1954 until said 5th day of April, 1955;

(b) That on or about said 5th day of April, 1955, said Franks Manufacturing Corporation did merge with the Cabot Shops Inc., a Massachusetts corporation, and that the merged corporations, the defendant in the herein action, has continued the business of said Franks Manufacturing Corporation, through the Franks Division of said Cabot Shops Inc., and has maintained since said 5th day of April, 1955 and does now maintain a regular and established place of business in Tulsa, Oklahoma, and in Los Angeles, State of California, within said southern district of California;

(c) That the defendant herein did on February 24, 1956 sell to the Union Oil Company of California, within the southern district of California, a Super Senior Clipper Drive-In vehicle, serial number 1861, and that the defendant and its predecessor corporation, the Franks Manufacturing Corporation, did subsequent to March 9, 1954 and prior to the bringing of this action, sell within the United States, including said sale to said Union

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Oil Company, a total of seventeen (17) Clipper Drive-In units, to-wit: three (3) Midget Clippers, nine (9) Senior Clippers, three (3) Super Senior Clippers, and two (2) Clippers identified by the symbol 137-65-G.

(d) That defendant has acquired all the liabilities [3] of said Franks Manufacturing Corporation, an Oklahoma corporation, and,

(e) The defendant does not claim any ownership or any part of the right, title and interest in or to said Letters Patent 2,671,537, or in or to the inventions and discovery secured thereby, nor any shop right, or any other right or license thereunder or thereto.

Mr. WAYLAND B. WOODY

of lawful age, being first duly sworn, deposeth and saith in reply to the interrogatories propounded, as follows, to-wit:

Direct Examination

Q. (By Mr. Subkow): You have given your name to the reporter? A. Yes.

Q. Have you given your address too?

A. No. You mean my home address?

Q. Yes, your home address.

A. 2646 South Florence Drive.

Q. Are you connected with the defendant Cabot Shops, Inc.? A. Yes, as an employee.

Q. What is your position?

A. Chief engineer. [4]

* * * * *

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. Then we will understand a Drive-In unit to be a unit in which the derrick is mounted on a vehicle so that the crown of the derrick is toward the rear of the vehicle and the front of the derrick is toward the front of the vehicle, is that correct?

A. Yes. [11]

Q. And a Back-In unit would be the reverse, in which the derrick is mounted on a vehicle with the crown of the derrick toward the front of the vehicle and the front of the derrick toward the back of the vehicle.

A. That's right, and the front and back, as far as the vehicle is concerned, is determined by the direction it normally is driven down the road.

Q. Yes. [12]

* * * * *

Mr. Subkow: Just to keep our record straight, let's offer for identification, the '57 catalog of Franks Division, [16] Cabot Shops, Inc., as plaintiff's exhibit 1 in connection with the deposition of Mr. Woody, to which Mr. Woody has been referring in his previous testimony.

The Witness: Yes.

Q. (By Mr. Subkow): Mr. Woody has asked to see a previous catalog which plaintiffs have in their possession, and it is entitled Franks Division, Cabot Shops, Inc. catalog 56, in which there is a loose fly sheet showing Clipper 137-65. The catalog and the fly sheet are here offered for identification as plaintiffs' exhibit 2. [17]

* * * * *

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. All right. Referring again to exhibit 2, will you identify in exhibit 2, the units which appear at pages 1883, 1884 and 1885 of the catalog exhibit 1?

A. Well, now---

Q. Let's identify them, just take 1883 of exhibit 1. [18]

A. 1883 appears at 1807.

Q. Of exhibit 2?

Q. Of exhibit 2? A. Right.

* * * * *

Q. And 1885 of exhibit 1, the structure shown on page 1885—

A. Is the same as 1809.

Q. —is the same as 1809 of exhibit 2?

A. Right. [19]

* * * * *

Q. So that summarizing, we will say the structures offered for sale, are those previously identified. Now, as I see it, there are three kinds of units that you have sold?

A. Right.

Q. One with a single set of front wheels shown on 1810 of exhibit 2?

A. Yes.

Q. A Senior Clipper type shown on page 1809 of exhibit 2, and the Super Senior Clipper type shown on page 1808 of exhibit 2.

A. Right. Correction. The Super Senior, there may be some confusion, but the Super Senior shown on 1808 and 1807 are the same basic unit, except for the size of components, so they should be treated as one.

Q. So there are really three as I have stated?

A. Yes. [20]

* * * * *

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. This is a drawing which you have handed me, identified as a Self-Propelled Servicing Unit, drawing number 100-075. A. Right.

Mr. Subkow: We will offer that drawing for identification as plaintiff's exhibit 3, in connection with the deposition of Mr. Woody.

Q. Just to get the record straight now. Drawing 100-075 is page 1883, is that what you said?

A. That is correct.

Q. Page 1883 of exhibit 1 A. Yes.

* * * * *

Q. You have shown me a drawing entitled Senior Clipper, number 41-129, which is an original vellum pencil drawing and can you identify the structure of which this is the drawing? A. This is—

Q. By this you mean?

A. 1884 of exhibit 1.

Q. The structure shown on page 1884 of exhibit 1? A. Right. [21]

Q. And this will be plaintiff's exhibit 4. Now, have you the drawing showing the structure shown at page 1810 of exhibit 2?

A. I don't have those. I think they can be produced. [22]

* * * * *

Q. Now, are the relationship of parts on assembly 25-A, the same as on the form shown in 1810 of exhibit 2?

A. They are similar. The components are different and the spacing is different.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. What components are different? What spacings are different?

A. Well, the drive components, this was actually built—was built with a mechanical transmission where this has a semi-automatic transmission and you will notice that the bogey is set back from the back end of the frame.

Q. On the form shown on page 1810?

A. Yes, whereas here it is at the extreme rear end.

Q. But with respect to the derrick and the derrick mounting and the pivoting of the form shown on 1810, is that the same as that shown in assembly 25-A?

A. Very nearly.

Q. The difference being where?

A. Well, this shows——

Q. "This" being assembly 25-A? [26]

A. Assembly 25-A shows the raising cylinders at a slight angle, where they are vertical in the unit shown on 1810, which is merely a matter of positioning and assembly itself.

Q. Otherwise they are the same? A. Yes.

Q. (By Mr. Subkow): I offer assembly 25-A for identification as plaintiff's exhibit 5.

Q. Now, you have picked up another form, showing assembly drawing number 109. Will you identify that.

A. That is the same basic unit as 25-A, except for the tandem front axle.

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Q. In other words, it represents the unit shown on 1884 of exhibit number 1?

A. As actually built.

Mr. Subkow: I offer this as the plaintiff's exhibit number 6.

Q. I show you assembly drawing 94-A. Can you identify the structure shown on that drawing?

A. That is the unit on page 1883.

Q. Of exhibit 1? A. Of exhibit 1, yes.

Q. Of the '57 catalog, exhibit 1. A. Yes.

Q. As actually built? A. Yes. [27]

Mr. Subkow: I offer that as plaintiff's exhibit 7 for identification.

* * * * *

Q. I show you assembly drawing number 48. Can you identify the structure there shown?

A. That is essentially the same rig that is shown on page 1884 of exhibit 1, '57 catalog.

Q. As actually built?

A. Well, there is a difference in the hoist there, it isn't quite accurate, but essentially that describes the unit.

Q. As actually built? [28] A. Yes.

Mr. Subkow: We offer this as plaintiff's exhibit 9.

Q. If I haven't asked you before, I believe this is correct, as explained in your previous deposition, each of the structures shown in exhibits 5 to 9 inclusive, show structures as actually built and sold

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by the defendant and its predecessor in interest,
is that correct? A. Yes.

Q. I now show you assembly drawing number
103. Can you identify the structure there shown?

A. That is the same unit, page 1884, of the '57
catalog.

Q. Exhibit 1?

A. Yes, with variation in components which
changes the weight distribution.

Q. Showing the structure as actually built by
defendant and its predecessor and sold by them?

A. Yes. That unit was not built, none was
completed before the merger.

Q. But has been built and sold since the merger?

A. Yes.

Q. You are now pointing to the assembly draw-
ing 103? A. Yes.

Mr. Subkow: We offer that as exhibit 10. [29]
* * * * *

Q. I show you a drawing, having no markings,
and will you identify the structure which is shown
on this drawing?

A. That is a more accurate description of the
unit shown on 1884.

Mr. Subkow: The drawing, I will offer that
drawing as plaintiff's exhibit 14.

Q. And the form is actually sold by the defend-
ant? A. Yes.

Q. It shows apparently the unit in position,

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ready for the elevation of the derrick, is that correct?

A. That's right, except that the outriggers were not pulled out. [32]

Q. And prior to the setting of the outriggers?

A. Yes.

Q. Now, we have some more drawings here. You handed me some free sheets marked New Midget Clipper. Will you identify this free sheet and the structure there shown?

A. That is an artist's drawing of the unit before construction, that is described on page 1810 of exhibit 2.

Q. When was this brochure printed and distributed?

A. These were distributed at the West Texas Oil Show in 1954.

Q. At the time that the unit itself was shown?

A. That's right.

Q. Was it distributed to anybody prior to that date?

A. I am quite sure that it wasn't.

Q. Did the drawing show the unit as actually exhibited at the Show?

A. Not as actually exhibited. The photograph which we have brought—

Mr. Subkow: First let's mark this exhibit plaintiff's exhibit 15.

A. This photograph is the artist's conception,

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

this photograph shows how it actually looked when it was built. Here is another view.

Q. Let's identify them. Plaintiff's exhibit 16, is a side view of the unit referred to in plaintiff's exhibit 15, as it was actually constructed and demonstrated at the West Texas Oil Show, is that correct? A. That's right.

Q. What year? A. 1954.

Q. And is the first unit so built and demonstrated of this Drive-In type? A. That's right.

Q. And plaintiff's exhibit 17, is another view of the same structure, from another angle, taken at the same time and at the same place, is that correct?

A. No, this was taken in the plant yard. I presume as it left to go to the Oil Show.

Q. But is of the same structure and showing the derrick in the vertical position before extension of the mast, is that correct? A. That's right.

Q. You say this was the vertical position, but it actually has a slight lean forward, doesn't it? How many degrees would you say?

A. It appears to me it is probably—there is nothing straight to go by, but it is probably a degree or so. It is not necessarily the working position, it was just put up there.

Q. But in the working position, it slightly leans forward, does it not?

A. It leans—that height will average three and a half to [34] four degrees in the working position, depending on the situation.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. And you call that vertical? A. Yes.

Q. Can we get our drawings in numerical order, so that I can have a set for the witness and a set for me to work with. Now, you have produced some more photographs. Will you identify these additional photographs?

A. This is a photograph of the first,—well, it is the unit illustrated on page 1884 of exhibit 1, and is the first unit as actually constructed.

Q. And this was sold? A. Yes.

Q. Showing the derrick in erect position and guyed? A. Yes, that is right.

Mr. Subkow: We will mark this exhibit plaintiff's exhibit 18.

Q. I show you a photograph of what looks like an artist's rendition of something. What do you identify that as?

A. That is the artist's conception of a servicing unit built on a special chassis that he proposed to build.

Q. Will you tell us where did you obtain that photograph?

A. That was furnished to us by the Dart Truck Company, of Kansas City, Missouri.

Q. When was it furnished to you?

A. To the best of my knowledge, sometime in 1952 and now, [35] I don't know when.

Q. Who furnished it to you then?

A. You want the man's name don't you, and he

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

is no longer with Dart. He has a nickname but his right name, it slips my mind right now.

Q. Have you any correspondence of any kind with him? A. Yes.

Q. Can you locate that correspondence and let us have it—— A. Yes. ,

Q. ——before we finish?

A. Yes, we will get it.

Q. Mr. Woody, will you take these drawings, these exhibits and segregate the typical example of the three types of structures which you sold. I believe we can start with 3 and 4, and then we will select the one showing the one having the front wheels.

A. If I understand what you want is all of the other exhibits that are essentially this same unit?

Q. What I want is to select the drawings showing the three types of units we have been talking about, and I think plaintiff's exhibits 3 and 4 shows two of those types. A. That's right.

Q. Therefore, we want one only of the third type that will show best the construction of the device. Is there some surface we can put this on somewhere? [36]

* * * * *

Q. I show you a drawing, no number, marked Clipper Midget, dated 7-10-54 drawn by Scott. Can you identify that drawing?

A. That is essentially the same—that is your preliminary drawing shown on page 1810.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. With such differences as appear from comparison of the two, is that correct?

A. Yes, it has a little different drive.

Q. The drive unit from the engine, otherwise it is the same?

A. The same.

Q. I notice however, that there is a difference in the positioning of the jack. In 1810 it is vertical and the drawing to which you refer it is slanted.

A. Well, this is using the core drill cylinder with a shorter derrick and this actually was built with a heavier derrick.

Q. You mean 1810?

A. 1810 and it has multiple stage cylinders and this is a single stage.

Q. By "this" you are referring to the drawing which was [37] identified and which we will offer as plaintiff's exhibit 20. Exhibit 19 is offered for identification, and you will get that correspondence for us?

A. Yes.

Q. Exhibit 20 is the unit with the date 7-10-54 and drawn by Scott?

A. Yes.

Q. I show you a drawing marked with the number 99-005, Junior Clipper Hoist. Can you identify that drawing?

A. This drawing represents the first unit of this type as built with the single axle which is illustrated at page 1809 of exhibit 2.

Q. This will be exhibit 21. I show you drawing 99-006. Can you identify that?

A. That is the same unit as 99-005.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. That is the same as plaintiff's exhibit 21?

A. The same as exhibit 21, except that it shows a tandem front axle arrangement, as is also shown in the picture on page 1809 on exhibit 2.

Q. Mr. Woody, you have now recalled the name of the man associated with the Dart Truck Company who brought exhibit 19 to you?

A. That's right.

Q. What is his name?

A. W. R. Ross, he was sales engineer for Dart at that time. [38]

* * * * *

Q. In front of us. Now plaintiff's exhibit 3, as I understand it, shows a side view on the bottom and the top view at the top of the drawing—no, I beg your pardon, an underneath view on the top of the drawing.

A. That is a plan view up above.

Q. Yes, a plan view. I beg your pardon. A plan view on the top and on the side to the right adjacent the portion which shows the Franks' name plate, the front view.

A. Right.

Q. Of the structure which you have identified when you [39] identified this drawing.

A. Right.

Q. Now, I will give you a red pencil, Mr. Woody, and I ask you to mark on the drawing the chassis of the structure, by a notation for example 1.

A. The chassis, as I understand the chassis, the chassis is the frame, the supporting frame for whatever is being carried, together with all axles and

Plaintiffs' Exhibit No. 98—(Continued)

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wheels, and it would mean blocking off a complete portion of it. This is the chassis frame right here.

Q. The chassis frame then you mark as 1.

A. Right, that's 1.

Q. Now the chassis frame consists of what?

A. Well, there is the bogey——

Q. Would you mark the bogey.

A. Which is this assembly drawn there just by——actually I think it would be generally understood, if we just put a mark like that, which applies to both of the rear axles and supporting assembly.

Q. You are marking it with a number, what number? A. With the number 2.

Q. Now, the bogey is composed of a carrier which you will please mark 3.

A. Here is your two axles.

Q. Mark the axles for us please. [40]

A. All right. The axle assembly centers around the area number 3, and here is another one right here.

Q. That is the rear axle assembly?

A. Yes.

Q. And it is mounted on a frame work of some kind?

A. A tandem suspension system, which in this case is shown here, and the only part of it that is shown, this mechanism here, we can mark that 4.

Q. Mark it on the upper one.

A. And here, with its connecting material is 4, and here it is again. This is also number 4.

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Q. Is this pivotally connected to the chassis frame there?

A. It oscillates about this center here.

Q. Will you mark that 5?

A. Yes, a number 5.

Q. Does the bogey axis pivot upon any axis perpendicular to the axis of 5? A. No.

Q. I see also two sets of wheels mounted at the front of the chassis frame. Will you explain the construction of that mounting please.

A. The two sets of wheels at the front of the chassis frame are in effect a powerless tractor, using tractor in the terms that it is used in the highway trucking industry. It consists of a fixed rear axle, which we can number as 6, and a steerable [41] front axle, number 7, together with the supporting springs, the frame work and steering mechanism.

Q. Will you mark the frame work with a number 8. A. It is the frame work.

Q. Does it appear on the upper drawing too?

A. A portion of it appears out here.

Q. Will you mark that portion?

A. And here. Those are both number 8.

Q. Will you mark axle 7. A. Here is 7.

Q. Will you please be so good as to connect the red line.

A. The center of rotation of the wheels is there, and of course this dotted section—

Q. Mark that 7-A, since we are talking about it.

A. This is 7-A, and then this become 7-A here.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

The 7 is the axis or is the—if we bring it down to the rotating center of the wheel, then that rotating center is——

Q. Is 7, the axis of the axle upon which the wheel is mounted? A. Yes.

Q. All right.

A. And that is out of sight here.

Q. Will you mark the two wheels, by appropriate numbers, 9 and 10.

A. You mean these front ones? [42]

Q. Yes, the front ones by nine.

A. Right.

Q. And the other front wheels that are behind there by 10. A. Right.

Q. Now, does the entire bogey pivot about an axis perpendicular to the horizontal? A. Yes.

Q. Will you mark that axis please.

A. It should be an extension of this center line here.

Q. Can you mark it? Mark that with some number. I think the next number is 11.

A. Number 11 is the axis, perpendicular axis that it rotates about.

Q. I understand that the chassis frame there is mounted upon a block or—— A. A fifth wheel.

Q. ——a block of some sort. Is it this structure I am pointing to?

A. That is part of the chassis structure. It is mounted on a fifth wheel which is this assembly in here.

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Q. What do you mean by fifth wheel? Will you mark it with a number, so we will know what it is?

A. It is number 12. A fifth wheel operates the same as the so-called fifth wheel between a tractor truck and a semi-trailer. [43]

Q. It is a pivot—

A. It is an axis of articulation.

Q. Is it a vertical bearing and a vertical shaft and a vertical journal about which the structure 8 pivots when the wheel isn't driving—the steering wheel is concerned, is that correct?

A. Well, the bearing, of course,—its axis is vertical but its rotation is in the horizontal plane, but it is a thrust bearing in other words.

Q. In other words, the structure is such, in turning the steering wheel, which I will mark 13, the frame 8, rotates about axis 11, so that the front wheels 9 and 10, are turning to an angle—

A. They rotate all that—

Q. That track?

A. —that track that is at an angle to the axis.

Q. So now the weight of the structure is transmitted to the ground when it is travelling or resting and before any jacks are placed on it, along the axis 11 to the wheels 9 and 10? A. Right.

Q. And it will go there through the rear—

A. Suspension system.

Q. —suspension system, 4 to the wheels, through the axles 3, to the wheels 2. A. Yes.

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Q. Will you put another 2 on the corresponding rear wheel.

A. O.K. and we will just mark them up here.

Q. All right and mark them on the top view too. Can you tell us, Mr. Woody, why you chose two sets of front wheels and two rear wheels for the truck assembly, instead of just two front wheels and two rear wheels?

A. You mean why we chose an oscillating front end?

A. Why did you select the particular construction, double, four wheels as I see instead of two front wheels as you did on one of your other structures?

A. This chassis arrangement was dictated by highway laws, in order to get the maximum carrying capacity permissible in the—or within the framework of existing highway laws.

Q. Is it correct then, that the weight of the structure was such that if you only used two front wheels, it would be too heavy a load?

A. You mean use this single axle?

Q. Yes.

A. That is correct, yes, for the unit we intended to produce.

Q. Is it true, or did you consider that the highway laws with respect to the total weight which is permitted on the front wheel assembly of a truck, do I understand these requirements to be that where you have two sets of front wheels, the loading upon

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the wheels should be such that the resultant load taken through midway between the two wheels, should have a certain maximum value? [45]

A. The way the highway laws are written, there is a maximum value for tires, there is a maximum value for a single axle, there is another maximum value for axles that are spaced apart.

Q. And those front axles, to which this maximum value applies, are supposed to be designed, are they not, so that each wheel will bear an equal load?

A. That is correct, approximately so.

Q. And that the net load, the resultant load on these wheels, should be exerted in a line midway between the axles of the wheel sets?

A. That isn't true.

Q. Tell us what is true.

A. The load—the center of the load application is not in the center of the two axles.

Q. Where is it then?

A. It is proportioned so that under maximum legal loading, the rear axle, which has dual tires on it, and hence the most equipment, will carry 18,000 pounds. The proportion that is left over of that legal maximum will be carried on the front axle. In other words, what it actually is, is a 25-35 arrangement.

Q. I said practically equal. A. Yes.

Q. But the weight is greater on the wheels 10, than on the wheels 9, is it not? [46]

A. Right.

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(Deposition of Wayland B. Woody.)

Q. So then the line of load application is to the left of axis 11, as we see it on exhibit 3.

A. Right. That is, axis 11, to state it correctly, is to the left of the center line of the axis. Axis 11, which is the axis of load application, is to the left of the center line between the two axles.

Q. Will you draw a center line between the two axles?

A. Well, it is approximately I would guess up about there—not quite either—that is awful close to it.

Q. This is the physical center line between axles 7 and 6, you are now marking—— A. 14.

Q. ——you are now marking that center line as 14? A. Yes.

Q. All right. Therefore the line of load application of the weight of the unit upon the bogie assembly 8, is along line 11, which is to one side and to the left as viewed, of the physical center line 14, line midway between the axles 6 and 7?

A. Correct.

Q. Will you draw a number 6 to the axis point please? A. Right.

Q. Now, we drew 13 as the steering wheel, and will you put a notation on the cab as 15, and mark 16 as the side windows, and the back of the driver's seat and where the driver sits, [47] that is 17 and 18. The back is 17.

A. And the seat cushion?

Q. Yes, where the driver rests his weary self.

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A. There is the cushion, number 18.

Q. All right. Now, in the structure shown here, what is positioned inside of the cab?

A. Just the steering controls for highway operation.

Q. Yes, so the driver sitting in the cab can drive the unit?

A. The vehicle, yes.

Q. Does he have the controls for lifting the derrick and so forth?

A. No.

Q. Does he have any control for operating the winch?

A. No, he has just his steering controls.

Mr. Crowley: I assume he has some control over the driving of the device, the motive power?

The Witness: That's right, but just as it affects highway operation.

Mr. Crowley: Only highway operation.

The Witness: He can't do anything else in there. You have to come around back here to do that.

Q. Now, what I see is a telescopic derrick, mounted upon this truck chassis, is that correct?

A. That's right.

Q. Will you mark the front legs of that derrick with the next number. [48]

A. This would be 19.

Q. That is, you are marking the lower end of the front legs, aren't you?

A. 19 here, and 19 here and number 19 here. Now then we can make 19-A for the front legs, upper section.

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Q. That is the section that telescopes inside of the outer section? A. Right.

Q. Will you tell me what this member which I am marking as 20 is?

A. That is the rear legs of the lower section.

Q. Will you mark the rear legs of the lower section.

A. The rear leg is number 20, it is right directly behind there.

Q. Have you any rear legs of the upper telescopic section?

A. Yes, sir, right here. This will be 20-A.

Q. Now, is there any cross-bracing provided between the front and rear legs of the outer section, which you have identified as 19 and 20?

A. Well, this was typical——

Q. Will you mark the typical bracing?

A. That would be 21. Now, this is the lower section.

Q. We are taking the lower section first.

A. Here is 21, here is some bracing, and of course, this is also additional bracing here. [49]

Q. I am going to mark two units 2 here, which are transverse members connecting 19 and 20, is that correct?

A. That's right, those are the members in the girth at that point.

Q. Is the section defined by 19, 20, 22, and cross-bracing 21, are they properly considered panels?

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A. Panels or the area in between is a bay,—panel or bay.

Q. There are a series of such panels and bays along the side of the derrick, which appears on the drawing exhibit 3, is that correct? A. Yes.

Q. And there is equal construction on the opposite side of that structure? A. That's right.

Q. Which would then appear in the plane shown to the right or front view of figure 3?

A. That's right.

Q. What is the construction on the bottom here, which runs perpendicular to the plan of the side view appearing on figure 3?

A. It would be in what we would call a back panel.

Q. A back panel of the same construction?

A. It is similar. Right here in this bottom bay it varies.

Q. That is the lowest bay? A. Yes. [50]

Q. Will you mark the bay you are talking about as A?

A. Well, here, you can do it this way, A. Now, that has special construction, in that there are members along here, that have diagonal bracing between them that straddle the cab.

Q. Can you identify that in one of the other drawings? A. We can mark it up here.

Q. You are now turning to page 1818 of plaintiff's exhibit 2? A. Right.

Q. The first structure shown on the extreme

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right in the erect position, is the same derrick as illustrated on figure 3?

A. Essentially the same.

Q. Will you go ahead and describe it. We are now seeing what you called the back bay—what did you call that now?

A. The back panel.

Q. The back panel.

A. Now that particular structure—

Q. What are these little marks you are drawing?

A. Well, the bracing that goes in there. That one is modified. These may not be precise, but these illustrate the principle of the section. Then the bracing above that point has another member that comes from here up to there. Now this is the modification of the back panel, so that it will straddle the cab and essentially, the actual construction,—this is preliminary,—this cab isn't exactly like that. It is set back here. [51]

Q. You are talking now about figure 3, the position of the cab?

A. Yes. It is actually set back there and doesn't extend up quite as high as shown in this illustration.

Q. It doesn't make much difference.

A. No, it doesn't make a great deal of difference.

Q. So that the figure 3 shows a cab a little too far forward, and the top of the cab a little higher than it is actually constructed and built?

A. Yes, that's right.

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Q. Which you do not consider of any essential difference? A. No.

Q. Now, I am afraid the markings that you made for me in red won't reproduce. Will you please be so good to convert them in the same markings with a dark pencil so that they will reproduce?

A. I don't think that is going to reproduce either.

Q. Why not use ink? You have now marked in ink on page 1818, over the red lines, the extra bracing, which is introduced into the structure shown on page 1818 as is actually employed in the structure shown in exhibit 3, is that correct?

A. In the back panel, bay A.

Q. Bay A? A. Yes.

Q. The other bays in the structure have the cross-bracing [52] as illustrated in 1818?

A. That's right.

Q. The rest of the structure of the derrick is the same as shown on page 1818 of exhibit 2?

A. Yes, that is essentially true. From time to time if we run into a little interference, we may convert some of those members, but essentially it is the same.

Q. Now, will you describe how that derrick is mounted on the chassis frame?

A. There is a frame work that carries those hinge members.

Q. Mark the parts as you refer to them. Where are we now in numbers? 23 is correct.

Plaintiffs' Exhibit No. 98—(Continued)
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A. Number 23, which shows here and here, is a supporting structure which is a part of the chassis, which carries the hinge member.

Q. Will you mark the hinge member here.

A. It is this area right in here. There is one segment of it, and 24, that is right in here. Here is a part of it.

Q. Is that a hinge panel for the mast?

A. Hinge panel for the mast. It is a sleeve type bearing.

Q. That is the upper half, and the lower half is marked 24-A.

A. Well, the dividing line doesn't show here. Actually there is a split——

Q. You are marking the split, a horizontal line, as 24-A. [53]

A. Now 24 is the removable part of the hinge as it is now marked, and this is a part of the frame work.

Q. Will you mark that as 24-A?

A. Right below the line is 24-A.

Q. And that is the lower section of the hinge?

A. Yes.

Q. And does 24-A and 24 form a bearing in which there is a shaft? Is that correct?

A. Which is a part of the derrick.

Q. Will you sketch in the shaft.

A. Well the arrangement—let's see now——

Q. You are now sketching the arrangement of the shaft?

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A. That is correct. Of course, there is other structures in there, but let's make this 25.

Q. Mr. Woody may I help you,—not to help you but to ask you whether 25 is composed of a tube?

A. That is a tube, correct. That is a structural tube on the derrick.

Q. A structural tube that extends clear through and joins 20? A. That is correct.

Q. Is welded to 20? A. That's right.

Q. And the tube is carried on a frame work shown as 25 and 25-A and 25-B.

A. That forms the truss there. [54]

Q. With diagonal 25-C, that forms a truss which carries a tubular member, which is welded to 20, and which is pivoted in the bearing 24 and 24-A?

A. Right, but actually the bearing, there is a sleeve in there, then some gussets that aren't illustrated, in bronze bushings inside that bearing.

Q. But essentially their purpose is to provide a bearing, through which a pivot shaft passes, so that the derrick can rotate about an axis. Will you please mark the axis of rotation.

A. This will be 26, right there.

Q. Will you mark the axis of rotation as 26 on the other front view. A. Right.

Q. Now, Mr. Woody, the truss 23, would you please mark the other side of the structure with the same equivalent number. You are marking it 23 and 23-A. This truss member is carried on the chassis frame, is it not? A. That's right.

Plaintiffs' Exhibit No. 98—(Continued)
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Q. By means of gussets. Will you mark the gussets. You are marking as 23-B the gussets upon which the truss 23 is mounted upon the chassis frame, is that right? A. Welded to the frame.

Q. Welded to the chassis frame, and will you mark the chassis frame there on the view upon which you have marked [55] 23-A and 23-B.

A. Of course, you understand this is all welded together, but this is essentially——

Q. This would be the one you are marking 1?

A. Yes, the end of the frame member.

Q. The end of the chassis frame member?

A. Right.

Q. To which the structure 12 and 8 is attached?

A. Well, 12 is attached, but 8,—see the frame work here and there is a bearing between them.

Q. Well, let's say it is carried then.

A. Right.

Q. Or mounted,—carried or mounted.

A. Yes.

Q. I see a trapezoidal section which I will ask you to mark 27, and will you also mark it on the other view. Now that trapezoidal section is mounted upon the frame work 1, is it not? A. Right.

Q. And upon which the so-called fifth wheel 12 is located, is that correct?

A. Right. It is the load transfer member.

Q. Which transmits the load from the chassis frame to the wheels?

A. Through the fifth wheel. [56]

Plaintiffs' Exhibit No. 98—(Continued)
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Q. Through the fifth wheel to the wheels 9 and 10? A. Right.

Q. Look at the truss members 23. I will point out a member which I will mark—the inner diagonal member 23, which I will mark for this purpose 23-C. Do you see that member I am marking 23-C?

A. Right.

Q. I notice that forms a triangle which frames the front cab window——

A. There wasn't any front cab window, just the side.

Q. ——which would be 28, is that correct?

A. Right, in the front view it does.

Q. It is not shown in the side view?

A. No.

Q. Now the 28 is thus framed, is it not, by means of the members 23, including 23-C and the member 25? A. Correct.

Q. And the space between 23-C and 25 forms a window or porthole through which the driver can look, when he is driving. A. Correct.

Q. Now the members 23-C and the other member 23 which is the—well, let's put it this way, members 23, including 23-C are in the same place, are they not? A. Yes, correct.

Q. The plane being slightly to the perpendicular as shown [57] in the side view.

A. Right. I don't believe it is straight up and down. I think there is a little over two inches of slope.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. Now the axis 26 is a reaction point, is it not?

A. Right.

Q. What is it a reaction point to?

A. It is a reaction point through which all loads are transferred between the derrick structure—and I shouldn't say all loads, but it is a reaction point of transference of load between the structure load and the chassis frame.

Q. Will you tell us the members through which the load is transferred to the ground? Will you trace those members?

Mr. Crowley: May I say at this point, he mentioned the frame. Mr. Woody's answer to your prior question did not mention the ground.

Q. I am now asking him to trace the members.

Mr. Crowley: I just want to clarify the question.

A. In actual practice there are—which are not shown here—outriggers——

Q. Mr. Woody, I apologize to you, the question was not definite and Mr. Crowley is correct in calling my attention to it. I am now concerned with the structure in its roadable position.

A. In its roadable position, O.K. As a matter of assumption, which isn't quite correct, the load of a portion of the [58] derrick is transferred, that is the dead weight of the derrick and any accessories that may be carried on the derrick, a portion of that weight is transferred through the hinge bearing down to the chassis frame and——

Q. Through what members?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. Through members 23, through——

Q. I notice there are two 23's in the side view. You mean through both members?

A. 23 was originally used to describe the complete truss of course that carried the derrick. Now in the case of pure vertical loads, the vertical portion of 23 is the only one that will be affected.

Q. The weight portion being 23-D, is that right?

A. Right, it will be the only one affected, if it is pure vertical loads, but in actual loading operations there are forces fore and aft, and to one side or the other, on account of unevenness and changing course and one thing and another.

Q. So some force or load may be transferred through a member which I have now marked 23-E, is that right?

A. Right, slight, but there will be some.

Q. The majority of the load is transferred to 23-D——

A. Right.

Q. ——to the frame, member 1?

A. Right.

Q. Will you trace the transference of the load from the frame [59] member 1 to the ground?

A. The load comes through member 23-D and directly into that portion of frame member 1 underneath it, travels along the axis of the frame member 1, and as it travels it is distributed over the—I believe we called it a trapezoidal section.

Q. Which we marked 27.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. 27, and eventually ends up by being transferred to the front chassis assembly, along axis 11.

Q. To 8? A. To 8, along axis 11.

Q. From then it gets into axles 6 and 7—

A. Right.

Q. —and through the wheels to the ground?

A. Yes.

Q. And the springs, that is part of the transference of that load. A. Right.

Q. Will you mark the springs.

A. The only place they show would be in the front view, and that is 29.

Q. Are there springs that extend between axle 6 and 7? A. They are individual per axle.

Q. Then they are coil springs?

A. They are leaf springs. [60]

Q. Individual for each axle?

A. That's right.

Q. Then the force which is transmitted along the axis 11, is transmitted through member 8 to the springs 29, and through springs 29 to the axles 6 and 7, and thence through the wheels to the ground?

A. Right.

Q. Let's draw a perpendicular line through the hinge 26. Mr. Woody you are a much better draftsman than I am. A. This line here.

Q. Let's mark that as what?

A. 30 is the next number. Should we put line 30?

Q. Mark the 30, I think that will identify it enough. A. All right, 30.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. The location of line 30 with respect to the end of the chassis 1.

A. It is set back in actual practice, just far enough so that one part of the hinge member, that is the hinge cap, extends beyond the front of the chassis, beyond the thirty-five foot road limit. That is what governs the location of that.

Q. Mark the front of the chassis beyond which the cap 24 does not extend.

A. It extends slightly—this line here, this is the front of a single unit chassis. [61]

Q. Let's mark that with a 31.

A. That line represents the extreme, 31.

Q. The extreme front end of chassis member 1?

A. Right. Now that line there is short of being thirty-five feet from the extreme rear of the single unit, as defined in the law, so that lips of the hinge cap, extend a fraction of an inch beyond that, so that they are within the thirty-five foot limit.

Q. Extend a fraction of an inch forward?

A. Yes.

Q. So that the line 30 is set back toward the rear of the vehicle and intermediate the ends of the chassis being a distance of a fraction of a foot between 30 and 31? A. Yes.

Q. How many inches would you say?

A. I believe it is $2\frac{11}{16}$ inches, or something of that kind.

Q. What is the horizontal distance between line 30 and line 11?

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. This is approximate. It is approximately to the best of my recollection, $15\frac{1}{4}$ inches.

Q. What is the distance between the line 30 and the vertical line drawn through the center of axis 7?

A. Well, that is—the distance between 11 and 7 is 35 inches, so that would be slightly less than 20 inches, by that fraction. [62]

Q. The front of the member 8, forms a bumper, does it not? A. Right.

Q. Where does the front end of member 8 terminate?

A. It terminates—well, the bumper is just a little over the end of it, so that it is a quarter of an inch back, or three-eighths, or whatever the thickness of the bumper is, back from the front face of the bumper.

Q. Will you mark that as 32.

A. The bumper?

Q. The front face of it. A. Right.

Q. You have not dotted in the front view of member 8?

A. Yes, this is still 8 here. That would be 8.

Q. All right. Now, Mr. Woody, we have used the word roadable position. When we say a roadable position, what is meant by that term?

A. Roadable?

Q. Yes.

A. The roadable position or loading position is the attitude of the structure, the derrick structure.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

You see you are talking about the derrick structure as it is transported over the highway.

Q. That is shown in a side view on exhibit 3?

A. Right.

Q. Except that the jacks which I will mark as 33, are [63] removed and are not in position as shown?

A. That's right.

Q. Now, going back further, you have a mechanism for lifting the derrick toward the vertical?

A. Right.

Q. And into an erect position.

A. Right.

Q. Will you show us the structure that does that job?

A. It is just shown in side view here, that would be cylinder 34.

Q. The structure to which you refer is also shown in exhibit 1, is it not?

A. Right.

Q. Will you point that out?

A. This particular unit is right here.

Q. Will you mark that. You are marking it as 34 on page 1883, is that correct?

A. Yes, that is this cylinder.

Q. Mr. Woody, it is my experience that these things don't reproduce too well. You are now marking the 34 in ink now, are you not?

A. Right.

Q. Now that unit, it is a multiple stage—

A. Hydraulic ram.

Q. Double acting, or multistage as you call it.

A. Right.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. The outer cylinder of the member 34 is pivoted at its end upon the chassis frame 1, is it not?

A. Right.

Q. And the ram or piston of the cylinder is pivotally connected to the back legs 20 of the outer section of the telescopic derrick, is that correct?

A. Correct.

Q. Will you mark the hinge point?

A. The hinge point where it is attached to the derrick?

Q. Yes.

A. That would be 35, that is hinge pinned right there.

Q. Now will you mark the axis of pivot of the member 34. Mark it with a number 36.

A. Right.

Q. All right. Now that cannot be seen on the front view, can it? A. No.

Q. It is hidden behind what now?

A. It would be back of the rear wheels, and it would just confuse the front.

Q. I see. It is omitted for the purpose of clarity.

A. That's right.

Q. And it would be in line with the rear wheels?

A. It is approximately on the line of—it is not quite [65] on the line of the—its center line is slightly inside the center line of the outer dual wheel.

Q. Will you mark a line showing the outer limit of member 34, below the pivot point 36?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. The outer limit is just—it is just inside the eight foot limit——

Q. You are marking the eight foot limit now, are you? A. Yes.

Q. By that you mean?

A. Eight foot road limit.

Q. In other words, the distance between the line marked eight foot road limit—will you mark it on both sides?

A. Right here. Approximately there.

Q. That mark, that is eight feet between these two lines? A. That's right.

Q. That you have marked eight foot road limit?

A. Right.

Q. Now there are two such members 34, one on each side? A. Right.

Q. Each being connected in the same manner?

A. Right.

Q. Can you tell us the distance between line 11 and the vertical line passing through the axis 36?

A. Not offhand. I can get that.

Q. Is it roughly in the ratio shown on the drawing? [66]

A. Right. As I recall, probably from the front of the chassis frame there would be about 98 inches, or maybe it may be more than that, but it is around 98 to 104 or 105 inches from the front of the chassis frame to that station there. I have a recollection that this is 16 inches off of vertical.

Q. When you said 16 inches you meant——

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. The axis between the hinge points.

Q. Hinge point 35 and 36, is 16 inches?

A. Right.

Q. Measured in the horizontal direction?

A. Right. That is my recollection.

Q. Can you tell me the distance between the hinge 26 and the roof of the cab 15, measured in the vertical direction? A. No.

Q. You stated that as actually constructed the roof of the cab 20 was below the hinge 26.

A. I think we have a little more layout. That is partially complete.

Q. Can you show us that, if it will help you any.

A. Yes, I think I can find a print of that. [67]

* * * * *

Q. Tell me this, what is the relationship between the hinge 26 and the top of the head of the driver?

A. I think we have that on one of these other prints. I believe we have. His head is below that. Here is the actual construction here.

Q. You have the detail of a hinge construction with relation to the cab, which is shown on a drawing which has no number, but which we will now mark as exhibit 23. That shows hinge and derrick construction that is shown in exhibit 3, is that correct?

A. Yes, of the hinge construction. It is a detailed layout of the installation of the hinge.

Q. That is drawing exhibit 23.

A. Exhibit 23 which is a detailed layout of the

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

derrick hinge installation, and it is to the best of my knowledge essentially correct, as it was constructed.

Q. Now the top of the head of the driver would be below the top of the window, which was marked 16 on exhibit 3? A. Right. [68]

Q. And the top of the window we will mark as 16-A on exhibit 23.

A. His position is such that he can see out of there. There may be a portion of his head above that line, but how long is a man when he is sitting down? He will sink down in the seat a couple of inches.

Q. Normally he looks out this window?

A. Sure.

Q. So he can see out that window, is that correct? A. That's right.

Q. Without stooping?

A. That will be about 37 inches or more, from where he is sitting, from a folded position.

Q. Line 16-A will be 37 inches from where he is sitting? A. Yes.

Q. And the construction is such that the back legs——

A. They are above his line of vision.

Q. The back legs 20, are above his line of vision and straddle the cab, is that right?

A. One leg is on one side of the cab and the other is on the other side. The outside legs on the

Plaintiffs' Exhibit No. 98—(Continued)

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eight foot road limit and the cab is considerably narrower.

Q. Mr. Woody, will you mark the end of the front legs 19?

A. Well, this right here. This is the end of the leg. That is, there is a nut but it is welded and to all intents and purposes it is the end of the leg.

Q. Give it a number. What is our next number?

A. 37. Now that leg ends—let me see now—that ends actually, although this construction doesn't show it, this red line here, that I will make a double red line, and we will mark that 38. That is the end of that leg.

Q. Will you state what this diagonal member between 19 and 38 is?

A. That is a brace member, that under certain conditions of operation, may transfer the load from the rear legs to the supporting jacks.

Q. Supporting jacks are marked as what?

A. We will make them 39.

Q. Will you mark the diagonal member to which we referred, as 40?

A. Right.

Q. Do I understand, these are the jacks which when a derrick is erected vertical will extend to reach the ground?

A. Right.

Q. Mark them.

A. They are 39 here.

Q. Showing the dotted structure to which this is attached as the phantom view of the position of the derrick when erect?

A. Right.

Q. What is that block that I see below there?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. That is just a base plate to give more [70] area.

Q. Will you mark that as 41? A. Right.

Q. Now you have a winch shown, have you not?

A. Right.

Q. Will you mark that generally the next number 42.

A. Put an arrow from here to there.

Q. I think if you just mark it generally as 42, and that the outline of that is shown in lines 43, is that correct? A. Yes.

Q. That outline is sort of a cover that covers the hoist? A. That's right.

Q. And that is shown on page 1883 of exhibit 1. Will you mark that exhibit 1, will you mark the structure of the hoist 42. All right. That extends across the chassis frame 1, does it not?

A. That is the area.

Q. That extends across the transverse extent of the chassis frame? A. Right. [71]

* * * * *

Q. It overhangs the frame about eight inches on each side? A. Yes.

Q. Mr. Woody, will you mark the surface, the exterior surface 42. A. Right.

Q. On the top view.

A. All right, 42.

Q. The chassis frame 1, over which it overhangs.

A. Right. [72]

* * * * *

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. Can you locate for us the center of gravity of the winch? A. Not precisely.

Q. Roughly speaking it is somewhere between the hoist——

A. The drums and it would—and of course, it depends on what line you may have on the hoist. It will travel all the way from the left of the gear box from here to the right depending on the——

Q. But it lies somewhere between the axis of the two drums? A. That's right.

Q. Will you mark the axis of the two drums.

A. 44 and 45.

Q. The motor power, and also the hoist power is also positioned somewhere. Will you show us where that is?

A. It is towards the rear of the chassis.

Q. Will you show the limits of the position please?

A. Well, we can put a bracket here and call that 46, and the four and a half limits are included in that bracket.

Q. And the derrick rests also on a support on the rear end? A. Right.

Q. Will you mark that support for us?

A. That is 47.

Q. Taking the center line axis of the vehicle, as for example shown in the plan view exhibit 3, what is the relationship of the axis of the hinge of the derrick to that center [73] line? Would it be correct to say it is perpendicular to it?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. It is at right angles to it. As it you look at it here, it is perpendicular to it.

Mr. Subkow: Well, it is after five, this would be a good place to stop.

* * * * *

Q. (By Mr. Subkow): All right, Mr. Woody, in looking at the top plan view, there appears to be a discrepancy between the top plan view and the side view on the right. Would you please mark on plan view, the following members which appear on the front view. Let me put it this way. Does member 25-B appear on the top plan view? A. No.

Q. Will you identify there, Mr. Woody, the cross-member on which I have placed my pencil.

A. The way that section is taken, that represents the plane of—— [74]

Q. 23-C?

A. ——23-C and also behind that would be 23.

Q. Will you identify on the plan view 23 and 23-C.

A. They are all in this plane here.

Q. There is an error in that?

A. It isn't a complete projection. This just indicates——

Q. Will you complete that for us, so that we can make the top view consistent with the front view.

A. This, of course, is with the derrick lifted off.

Q. The top plan view has the derrick removed?

A. Right, so you can see underneath.

Q. In other words, the members 25, 26, 25-C,

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

25-B, 25-A, 19 and 20 are not shown on the plan view? A. They are not shown.

Q. The members 24 are also removed, are they not?

A. Well, yes. The hinges indicate it. It is not drawn in true fact there but it is indicated. Now then, if we were looking down on it from the top, actually there would be a line——

Q. You are placing a line in red pencil?

A. There would be a line here, where the two members came together—were welded together.

Q. The two members 23-C?

A. That's right.

Q. Will you mark that exhibit 23 prime? [75]

A. Right here?

Q. Yes. Mark the joining of the two members by 23 prime. Now the window which is shown in dotted line, would appear in full, would it not?

A. Well, actually it wouldn't. There is a discrepancy in the drawing there.

Q. Will you make that correction for us please.

A. The window—well, in fact, the cab, as pointed out before, the cab outline is towards the front, from where it actually is.

Q. Will you mark the cab outline on the top drawing? We have marked the cab 15. Will you mark the cab outline on the plan view by 15?

A. Can we refer to this other drawing here?

Q. You are now referring to another drawing?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. Yes. We had it here last night. That is a layout of that area.

Q. You are now calling for exhibit 23?

A. Right.

Q. All right. We have placed 23 before you.

A. Now, if we were to correct this top view here——

Q. You are now correcting the cab outline in the plan view of exhibit 3, to conform with the drawing exhibit 23, which you state shows the actual construction of the structure which was illustrated in exhibit 3, is that correct? [76]

A. That's right. Now then, the windshield actually is from here back to here.

Q. You are now outlining in red the windshield. Will you now mark that with the number 16 prime—no, I think you ought to change it, make it 28 prime. A. 28 prime.

Q. 28 being the window as shown on the front view of exhibit 3.

A. Yes. Now then, the top view as actually built, there are gussets, these are tubular members——

Q. "These" being what?

A. 23 prime are actually——

Q. You are talking about 23-C, aren't you?

A. 23-C.

Q. All right, mark 23-C.

A. 23-C will be these outlines here, conforming to this. Actually there is a gusset across here of some magnitude.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. That is the gusset which we have marked 23-A, haven't we?

A. Yes. Here is 23-A, and there is a second gusset back of that, which actually you can see that the member going down there is wider than this member across the front of the vehicle.

Q. You are talking about now 23-A?

A. Well, the front member of number 1, the chassis.

Q. All right. [77]

A. So draw that through, this gusset sets back in here, another gusset sets back in here, like that.

Q. Mark that other gusset as 23-B.

A. No, I think we have already used that.

Q. Yes, we have. Well, mark it 23-A prime then. All right. Will you mark the other member 23 that goes down to the frame. Now, will you tell us why this drawing exhibit 3, differs in the relative position of the cab from the exhibit 23?

A. Well, this was a preliminary drawing that was made up before the chassis was fully designed, and the position of the cab would have had no advantage and would have caused difficulties in construction, so that it was changed as shown on whatever this drawing is here.

Q. For convenience of construction?

A. Yes.

Q. But with respect to the utility of functioning of the structure, it made no difference?

A. No.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. Whether it was in the form shown in exhibit 23 or exhibit 3? A. No.

Q. What is the relative dimensions of the truss members, composed of 23, 23-C as compared to members, of 20 for example of the outer section of the telescopic derrick?

A. Well, they are different types of material. As I [78] recall the member 23, the outer principal support member, is four inches square, where the rear leg of the derrick is a four inch round tube.

Q. Will you mark the members 23, on the exhibit 23, you are now referring to.

A. Right here, 23, 23. That is four inches square.

Q. The member 23-E——

A. Is also four inches square.

Q. The dimensions having been chosen for rigidity and ability to support the loads——

A. That's right.

Q. ——on the rear legs? A. That's right.

Q. By the way would you put 23-E on exhibit 23, so we will know what it is. A. Right.

Q. All right. Now, Mr. Woody, the structure as shown on exhibit 3, is not complete is it, of the structure as constructed and sold? A. No.

Q. What is missing?

A. There are no outriggers shown.

Q. Have you any drawings that show the positioning of the outriggers?

A. Yes, we have. I can produce those. [79]

Q. You have now brought a drawing, entitled

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Installation Outriggers, number 21-988, bearing date 9-1-53, which is the date on which this drawing was made.

A. Right, that is when it was completed.

Q. I notice that on exhibit 3, that we have a date of 9-3-50. A. Right.

Q. Is that the date on which this drawing was completed? A. That's right.

Q. And that was a date earlier than the first production of any Drive-In unit by Franks Manufacturing. The first Drive-In unit was made after 9-3-50? A. Right.

Q. Did the first Drive-In unit of Franks Manufacturing, contain the outriggers which are shown on the drawing 21-988?

A. Essentially the same. They weren't just precisely the same.

Q. This drawing, as all other drawings which have been introduced into evidence as exhibits, where you have said they represent structures made, are true and accurate reproductions of the structures as built and sold? A. Yes. [80]

* * * * *

Q. Let's mark this exhibit 24. All right. Mr. Woody, will you now mark on exhibit 24, the members 23 and 23-C, so that we will have a point of reference and comparison between exhibit 24 and exhibit 3. Now, will you describe the construction of the outriggers as shown on exhibit 24, marking the parts to which you have referred, by numbers

Plaintiffs' Exhibit No. 98—(Continued)
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and explain the over-the-road position and the position of the outriggers when in use.

A. These outriggers over-the-road are foldable, as shown in the plan view above.

Q. Will you mark that generally, the plan view.

A. View A on the left side, and it is shown unfolded in View B on the right hand side of the plan view, and then in the lower part of the drawing, there is a front view that shows the complete system which, when the outriggers are extended, forms a continuous truss between the two widely spaced jacks that transfer any loads to the ground.

Q. Will you mark the jacks by number please?

A. A new set of numbers?

Q. Well, let's start with 101 on this.

A. O.K.

A. Right, 101.

Q. Now the jacks shown on the lower section of the drawing on which your number 101 appears, correspond to the position [81] of the outriggers shown in View B, is that correct? A. Right.

Q. Well, continue with your description please.

A. Now, then, these outriggers are used to stabilize, give a wider base and stabilize the derricks more than is possible with jacks set within the eight foot limit, and they are made foldable, so that you could still travel over the road, conforming to the eight foot road limit.

Q. This foldability is provided by hinges?

A. On the outrigger itself.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. Will you mark the hinges?

A. 102 is here and 102-A.

Q. It is equally so on the opposite side, is it not?

A. Right.

Q. There is also a hinge of some sort?

A. In the brace member.

Q. In the brace member. Will you mark the brace member with another number and the hinge that appears on it.

A. The brace member number will be 103 and the hinge will be 103-A.

Q. Will you mark the corresponding parts of the folded section of View A? A. Right.

Q. Now the truss which you have described, shown in vertical view on the lower section, is composed of a triangle, is it not? [82] Will you mark the parts of the triangle.

A. The truss is composed of members 104, 105 and actually——

Q. Member 23, is that correct?

A. Member 23, 23-C and going back to the other drawing, member 25.

Q. Which also appears as 25 on exhibit 3?

A. Right.

Q. I believe 25-B.

A. No, right here, — which forms a complete truss all the way through from one side to the other. Of course, additionally the front panel section of chassis frame 1, is also a part of that truss.

Q. Now, does the brace member 103, have any

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

functional relationship to the truss which you described?

A. The only function it has is stability.

Q. Stability against the displacement in the plane of the plan view?

A. That's right, fore and aft in the plan view.

Q. Now, there is a member here, on which I have put my finger, that you have not yet referred to. Can you identify that member and give it a number?

A. Number 106. Its function is maintaining the geometry of the outrigger truss members before assembly.

Q. Is it welded to 104 and 105?

A. Right, but it is not a load member. [83]

Q. It is not a load member, because whatever load in that direction is imposed, is carried by the member 23, is that right? A. Right.

Q. Referring back to exhibit 3, can you give us the distance from the top of the cab to the ground?

A. It is approximately 98 inches.

Q. That is pretty nearly standard for all trucks, is it not?

A. Yes, it runs about eight feet, more or less.

Q. But that is pretty much the generally accepted standard for trucks of all kinds?

A. Yes.

Q. There are some dimensions given on exhibit 3. Are those dimensions accurate and employed in the structure as manufactured and sold?

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. The front overhang is accurate.

Q. You mean that three feet?

A. Three feet zero.

Q. That is the distance between point 37 and the bumper?

A. That is right.

Q. Which you described before.

A. And that is necessary to conform to highway regulations. The overall length of the vehicle is substantially correct.

Q. That thirty-five feet also represents the legal length?

A. Yes.

Q. It must not be longer than that? [84]

* * * * *

Q. Now, we have described a structure up to now, in the position in which it travels over the road, have we not, Mr. Woody?

A. That's right.

Q. Now, tell me what happens when you drive into a location. Describe the procedure. You are now a truck driver and you are coming into a location.

A. You drive in in the same direction that you travel down the road, and drive in to a measured distance, generally from a point on the front of the vehicle to the polish rod or popping gears, and after you line up the vehicle and stopped it at the proper distance away from the well head, the next thing is to unfold the outriggers and then by placing suitable matting,—the matting that is used will be dependent upon the [86] type of location and the firmness of the footing.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. Just a second, Mr. Woody. Let's see if we can find something here. May I see exhibit 2 please? I refer to page 1812 of plaintiff's exhibit 2, the lower left-hand corner, which says Clipper Outriggers, patent applied for. Do you notice that?

A. Yes.

Q. Will you continue your examination, using this photograph as well?

A. Well, in this photograph the outriggers have been unfolded and the matting, or blocking, has been placed under the jacks.

Q. Jacks 101?

A. 101, to give greater contact area, according to the firmness of the support.

Q. By the way, that photograph is a photograph of the unit shown in exhibit 3, is it not?

A. I could not identify that. It is substantially the same.

Q. As far as the front view is concerned. The structure shown there is the same for all forms, is it not?

A. That's right.

Q. Of the three forms we have been talking about?

A. Yes, and these outriggers have been placed in contact with the ground and we could assume that they have also unfolded the jacks under the——

Q. We will come to that, but before we get to the jacks, you [87] are talking about the jacks 33?

A. Jacks, 33.

* * * * *

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. All right go ahead, Mr. Woody. You said you can assume that jack 33 has been placed. Will you tell us how jack 33 is placed?

A. It is similar—now, it is normally carried folded against the side of the frame. It is actually hinged to the frame. There may be a closer photograph here. One of these should show it.

Q. Well, perhaps we can expedite this by—

A. There is one of them that they didn't get quite removed, there is one there, then there is another? See, that is folded up there. There is a hinge. That is a jack.

Q. You are pointing to exhibit 2, page 1807.

A. Yes. Let's see this front view—no, they are covered up.

Q. You are looking at the front of the catalog, exhibit 2.

A. There is one.

Q. You are pointing to some structure which is [88] adjacent to the rear wheels.

A. Just ahead of the rear wheels. The fact of the business, that is shown on the cover.

Q. Mr. Woody, that is very unclear, is it not?

A. That's right.

Q. Well, can we go this far that—

A. We can mark the location on here.

Q. Well, we will do it simpler than that. Can we say that it is similar to the construction shown on figure 6, of the Moon patent 2 671 537, if not identical?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. No, it is not the same. These jacks in effect, they are not braced like those.

Q. They are not braced? A. No.

Q. But I mean as far as being carried on a frame,— A. They are carried—

Q. In a similar way?

A. Yes, they are carried on the frame, but they are—there is a hinge, a fore and aft hinge, whose axis is fore and aft, and it swings them in position under the frame, then when you release the jack, you can swing it back.

Q. Swing it back over the frame alongside the cylinder 34?

A. That's right, and just behind it.

Q. On the inside of the frame?

A. On the outside. [89]

Q. On the outside of the frame. You swing it in position, then what do you do?

A. Then if the foundation, or the soil isn't firm, you block up, lay a matting to distribute the load.

Q. How do you screw up the jack, to what degree?

A. Just sufficient to begin to take the load off of the frame unless—now, unless the frame is out of level and there are levels on the frame to check its position, and in case the frame is out of level, you jack up one or the other side to level it back up.

Q. In other words, the jacks are just brought up within a height to take any material amount of load off of the vehicle. A. Right.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. What is the relation of jack 33 and axis 36 of the lifting jack 34?

A. They are adjacent. They are not in line, but any loads applied along the axis of the ram 34, would travel a very short distance through the frame before they were taken out in through the jack to the ground.

Q. By the way, this mounting of 34, is not shown too correctly—too clearly rather, in exhibit 3.

A. It is a trunnion mounting, all the way through the frame.

Q. On some axis? A. That's right.

Q. Which transmits the thrust from the trunnion 36 to the frame? [90] A. That's right.

Q. And it also permits it to pivot?

A. Permits it to pivot, but forces both cylinders to pivot together.

Q. I see. They are connected together. The trunnions are connected by a shaft which runs across the transverse extent of the frame and is connected to each cylinder 34 on each side? A. Right.

Q. Now proceed. You have now adjusted the jacks 33, and then what do you do?

A. There is another set of jacks, there is a third set we can put in here in red pencil. They are in this area. We will just say, something like that. That is a pretty good jack if I do say so myself.

Q. You have now drawn in a jack in the rear in red pencil. Will you put a number on that? Why don't you just mark it 33-A? A. All right.

Plaintiffs' Exhibit No. 98—(Continued)
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Q. Go ahead with your description.

A. All right. The back jacks are put down at the same time that 33 are put down.

Q. All right.

A. And if any levelling is necessary to be done to level the frame itself, the jacks 33, 33-A, and of course the outrigger jacks have to be adjusted likewise. [91]

Q. Now, when you adjust your jacks 101, do you take any of the weight of the structure under the jacks and off the springs? A. We do.

Q. So that what you really do, you lift all the load of the structure off and the structure is now weighted on to these jacks 101?

A. A good portion of it is.

Q. How do you know when to stop?

A. Well, there is no positive criteria, but the springs only have a couple of inches of differential in their load, and if you raise those jacks about one and a half inches, you will have good, sufficient weight on the jack to stabilize it.

Q. Will you locate on exhibit 3, the axis of the jack with relation to the side view?

A. The axis of the jack is in the plane of the center line of the hinge 30.

Q. Now then, so that that extends the truss, composed of 104, and 105, extends perpendicularly to the plane of the side view? A. Right.

Q. All right, proceed with your procedure now.

A. Once all the jacks are placed and tightened,

Plaintiffs' Exhibit No. 98—(Continued)

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—that is if any lines which must be uncoiled or anything which has really nothing to do with the raising operation, after all [92] interfering parts have been removed, you are set up to raise the derrick.

Q. All right.

A. You have your base and it has been levelled. Then in the case of this unit, you go back of the draw works, where you are at a point of better vision and greater relative safety, and there is a control box back there that houses the derrick controls, and from that station you proceed to raise the derrick, and until such time as the structure is tilted by a predetermined amount, on the structure there is a tilt indicator which registers the degree.

Q. Indicates the angle of alteration to the vertical or horizontal? A. Right, to the vertical.

Q. To the vertical. Let's go back to the starting of the raising of the derrick. This is done, is it not, by introducing fluid under pressure in 34 to extend the ram? A. That's right.

Q. The ram is extended, the ram pivots at 36 and 35? A. Right.

Q. And the structure pivots at 26?

A. That's right.

Q. As it is raised, where are the reaction points? First will you tell us what we mean by reaction points?

A. A reaction point is a point at which a load is resisted. [93]

Q. All right.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. The external reaction points are in the derrick hinge.

Q. Number 26?

A. 26 and the fulcrum end of the ram 36.

Q. And from the fulcrum end of the ram 36, it goes down through the frame 1, to the jacks 33, and to the ground? A. That's right.

Q. With respect to the reaction point at 38, will you tell us what happens to the load that is thus experienced at 26?

A. Initially that load is upward in a vertical direction, or largely in a vertical direction, and as the raising process progresses—

Q. In other words there is a force vertical along the axis 30? A. Right.

Q. Opposing the downward force through axis 36? A. Right.

Q. What happens to this member there, in between those two lines?

A. That member must absorb that load in bending.

Q. Go ahead.

A. Now then, as the raising process progresses, the character of the load on the hinge—well the hinge is—

Q. We have marked the axis 26.

A. —axis 26 changes from an upward load to through zero to a downward load. [94]

Q. In what position in the raising of the derrick, does a downward component or force happen?

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. As I recall, it begins when the derrick is within six or eight degrees from reaching the vertical.

Q. You mean the perpendicular position?

A. Well, you asked—correction—you asked this, from what position from downward or from upward to downward?

Q. Yes, sir.

A. Without going back through some of the layouts, I couldn't give you an exact attitude, but it changes from upward to downward in the near area of where the force on the ram, as it approaches the weight of the structure.

Q. Isn't it true that the point of change is when the center of gravity of the derrick falls between hinge point 35 and the axis 36?

A. That would be very nearly true.

Q. Yes. You have such studies of this thing?

A. Yes.

Q. From which the exact point could be determined?

A. We have the anticipated raising pressures.

Q. And can that information be made available to us? A. I think it can be.

Q. Not at this very moment, but perhaps during the lunch time. From that point on, from the point where the center [95] of gravity passes in between these two hinge points, the force at axis 26 is downward? A. That's right.

Q. And that is absorbed by member 23 E and D?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. That's right.

Q. And transmitted to truss member 1?

A. Right.

Q. When that force is exerted, will you tell us what the condition of the member chassis 1, between hinge point 36 and the line of application of that force at 30?

A. At that time the load gradually reverses and you have a downward thrust.

Q. A downward thrust along the axis 30?

A. Right, and to begin with there is still a downward thrust along the—on point 36.

Q. Yes. A. And eventually—

Q. In that condition, the chassis member 1 is not bending, is it?

A. At that particular time the load in the chassis or member 1 is zero. For a time it goes through a condition of zero load.

Q. Then increases in bending as these loads increase?

A. No, it does have a bending load in a reverse direction. The direction of bending reverses over that initially. [96]

Q. Yes, because the direction of the force factor, when the center of gravity is outside the position of the hinge members 35 and 36, creates an upward thrust, therefore, the direction of bending is determined by these two opposite forces?

A. That's right.

Q. But when the force factor along line 22 re-

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

verts and becomes down, the direction of bending is reversed. A. Right.

Q. So that we can make the bending moment diagram—could you sketch in there the bending moment diagram under that condition?

A. As it goes——

Q. When the center of gravity is such, as to create a material downward moment force along 30.

A. Your maximum moment of course would be—as far as the frame is concerned, would be back at this point here, and it would taper to zero at that point, and it might be represented to go down here by a line——

Q. Wait a minute. I don't think we will be able to see it. Let's draw it in a little heavier.

A. And assuming the ground line is your zero——

Q. The ground line is the zero bending moment.

A. Right.

Q. We will mark the triangle which you say is the——

A. This is substantially straight. [97]

Q. We can draw a triangle at the bottom of the exhibit 3, which represents the bending moment diagram in the frame member 1, the maximum height of the moment diagram being a line 36 and the zero bending moment being a line with 26. Then can we now write in Bending Moment Diagram at the bottom?

A. Should we just cross cross that?

Plaintiffs' Exhibit No. 98—(Continued)
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Q. You are cross crossing the area which represents the bending moment.

A. Now then, since all jacks are down rigidly or firmly on the ground, and overall you have a center of gravity shift towards the front, which means that when the complete system is following through, that as the derrick goes forward, the load on the outrigger jacks increases.

Q. That is, as the derrick is being erected, because the center of gravity is moving forward more, and more weight of the derrick is moving forward?

A. That's right.

Q. And therefore, the front end of the structure is being loaded more and more, consequently the jacks, which help to support that structure, carry more and more of that load.

A. Right, and the bending moments in this area of the frame are a localized system, that doesn't affect the character of the load that goes on the extremes——

Q. On the back end?

A. ——on the back end and after the initial phase of rasing, [98] the load settles back on these front outriggers.

Q. Let's follow this a little more. Now, as we move to the perpendicular——

A. Yes.

Q. ——so that the center of gravity is now on the axis 30?

A. Right.

Q. The full weight of the structure is exerted along axis 30. We have located in this hypothetical

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case, that the center of gravity is all now on the axis 30? A. Yes.

Q. So then the full weight of the structure is now carried on members 23 and 23-E, is that correct?

A. As a stabilizing member, right.

Q. And then carried to the outriggers?

A. Right. Now then, the bending that exists in the frame, when the load becomes negative on the ram——

Q. When does the load become negative on the ram?

A. As the center of gravity passes beyond the hinge point.

Q. To the point of the hinge point as we view it on exhibit 3, on the side view? A. Right.

Q. Then what happens?

A. That has a tendency to relieve—it doesn't relieve the frame of any bending, but it has a tendency of relieving jacks 33. [99]

Q. And that load is transferred more and more to the outriggers? A. Right.

Q. When the derrick has now reached its vertical erected position, the axis of direction has some lean forward from the perpendicular, hasn't it?

A. Right.

Q. About how many degrees?

A. Three and a half, probably would be an average.

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Q. That has been uniform and conventional for both Back-In types and Drive-In types?

A. Yes.

Q. That is the element or kind of derrick that is used.

A. Right.

Q. When you have reached that position, where are you?

A. The next thing you do is set the jacks on the front derrick legs firmly on the foundation. [100]

* * * * *

Q. When did you first learn about it?

A. Twenty-three years ago.

Q. It is what anybody would normally use to handle a structure of that kind?

A. Yes.

Q. Then what happens, you hold it in that three degree position by the double acting cylinder.

A. Then you adjust your matting, that you may need on the particular location,—

Q. Which we have marked 41.

A. That is the base plate which would set on any matting.

Q. Let me see, maybe we have that shown in this same drawing that we had here. Very well, it is some sort of a flat support.

A. Sometimes it is a timber, sometimes it is blocks, individual blocks. It will vary according to the conditions.

Q. All right.

A. But that usually is approximately placed be-

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fore they even start to raise it. Then it is adjusted——

Q. As is 39 adjusted with a screw?

A. There is a screw.

Q. What is the maximum travel that you provide in the structure?

A. We try to hold them to around nine inches maximum.

Q. That is the maximum that you build? [101]

A. No.

Q. How far could that be extended?

A. That could be extended—oh, twelve, thirteen inches.

Q. O.K. That enters inside a hollow member 19?

A. Right.

Q. There is no physical limit however, that could be several feet long, if they wanted to.

A. That's right.

Q. We have got this thing extended and erected. What do you do with this structure?

A. Well, then you——

Q. Are you completely erected yet, Mr. Woody?

A. Well, you have some kind of guy lines——

Q. Tell us about the guy lines.

A. Ordinarily a unit of this kind, will have normally——

Q. You are now looking at exhibit 18?

A. 18. Ordinarily there are permanently attached to the rear end of the vehicle, two guy lines,

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that go to the crown of the unit. They are shown as the diagonal line.

Q. Will you mark these on exhibit 18, which you say are also employed in erecting the structure on exhibit 3, is that correct?

A. They come into play after it is erected and extended.

Q. Oh, well now, we haven't yet extended the derrick. Maybe we are getting ahead of ourselves. Let's extend the—— [102]

A. The operator after he gets this set up there on base, after the crew members have set the derrick jack screws, then he proceeds with extending the derrick, which in the case of these derricks, is done by another hydraulic ram,—a long hydraulic ram.

Q. You don't use the device you use in the Back-In units shown in the Moon patent referred to——

A. We changed that.

Q. Excuse me, you are interrupting me,—as shown in 2 671 537. You say you changed that?

A. That was changed before we abandoned the screw raising device, or I mean before we made this type unit.

Q. The Drive-In unit? A. That's right.

Q. All right. So there is some means for extending the derrick.

A. There is a long stroke hydraulic ram.

Q. The same way as a hydraulic ram used on a hydraulic elevator?

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. That is about the same, yes.

Q. So that then is erected to the position similar to that shown in exhibit 18, is that correct?

A. Right.

Q. Then you put the guys. You are now going to mark the guys. What is the function of those guys? [103]

A. The guys, since the structure is inclined, when the derrick carries loads on the travelling block, there is an unbalance in force, that tends to move the crown to the right and in order to minimize the bending that would exist in the structure, supports are placed at the crown, which in this case are these guy lines.

Q. The guys are in tension sufficient to take out the bending, caused by the overbalance of the crown? A. Right.

Q. By the way, looking at exhibit 18, does this show the position of the rams 34 and the other structures, similar to those which would appear in the former exhibit 3, when it is erected?

A. Very similar. The jacks are similarly placed. It isn't the same type of outrigger but it performs the same function.

Q. But from the point of view of rams——

A. Right.

Q. ——and the derrick and the guys, it is a good representation of the appearance of the structure?

A. Right.

Q. As when the derrick was erected and using

Plaintiffs' Exhibit No. 98—(Continued)

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the structure on exhibit 3? A. Right.

Mr. Subkow: How about giving us a little [104] breather?

(After a short recess, the deposition was continued as follows:)

Q. Now, Mr. Woody, we have described the erection of the structure and the forces which occur, and you have described the bending moments and the direction of forces. Would you say as a result of this construction that you have described, the chassis and vehicle creates a stable platform for the erection of the derrick?

A. Not without the supporting jacks, it wouldn't.

Q. I am including the supporting jacks.

A. Yes, that's right. Well, 33 and the outriggers, in combination with the outriggers they do.

Q. Will you tell us what happens now when you put up the structure into operation?

A. Well, the principal loading on the structure is introduced in the crown, from your travelling block and the system of lines, that operate over the traveling block and back to the hoist, and there is a vertical load at the crown from the travelling block, which produces an unbalanced force with respect to the angle of both legs. Generally there is an unbalanced force that is partially resisted by the line to the hoist and sometimes by a dead line on the back end of the structure.

Q. You have been pointing to page 1921 of exhibit 1 and the photograph at the lower left hand

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of the page. [105] Now, that is not the structure shown in exhibit 3, is that correct?

A. It is a similar structure, but it is not mounted on the same vehicle.

Q. But as far as the telescopic derrick and its supports and its operation, it is identical—

A. That's right.

Q. With the—may I finish Mr. Woody?—identical with the structure described in connection with your exhibit 3, is that correct? A. Right.

Q. Will you proceed, Mr. Woody, and will you put marks on the photographs to indicate the features which you are discussing.

A. There is the travelling block.

Q. You are marking it as what?

A. A, is the travelling block.

Q. Excuse me, let's use the reporter's exhibit 1. You have been marking my personal exhibit. I hand you the reporter's exhibit, turn to page 1921 of exhibit 1.

A. Now, the travelling block is A, and it will be noted that there are multiple lines extending vertically to the crown, which we will indicate the crown area by B; and then there is a load line or live line between the crown and the hoist drum which we will label C, and additionally there is usually a dead line which is tied back down to the frame of [106] the vehicle and on which a weight indicator is fastened, so that the operator can estimate the load being lifted at all times.

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Q. That dead line does not appear on photograph on page 1921 of exhibit 1?

A. It is not discernible in this photograph, but it is normally near the base of the derrick on the rear side.

Q. Could you put an X on exhibit 3, where that dead line would be connected?

A. Well, ordinarily it is connected in this area, on the opposite side, connects with the center ahead of the ram and to the main frame.

Q. You have marked exhibit 3 with that, Mr. Woody? A. Right.

Q. Go ahead, sir.

A. Now then the forces——

Q. Excuse me, Mr. Woody, for interrupting, you have not mentioned the guys.

A. Oh, they would come in a little later.

Q. I am sorry.

A. Now then, the forces that are introduced in the structure, the hoist exerts a force through line C, which goes over the crown, the multiple forward lines exert the greater force at the travelling block on any load that is to be pulled. The result of the load at the travelling block since it is [107] not or does not fall along the axis of the legs, the legs of the tilted structure has a tendency to produce an unbalanced condition, which would have to be resisted by bending—entirely by bending in the structure, if there were no other forces present, but since line C is included at a reverse angle to the

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axis of the load and the legs, it in some degree reduces the effect of that bending, and the positioning of the dead line at the rear, further reduces the effect of bending. Additionally the two guy lines D, which have previously been placed in tension tend to resist the remaining portion of the unbalanced forces, and as a result, the resultant of all forces is at some point, or will pass through it, pass at some point near the front legs, the front leg jacks.

Q. Mr. Woody, are there also in addition to the forces that you have mentioned, any forces due to the weight of the derrick itself?

A. There is a force that arises from the weight of the structure, but in normal calculations, those forces are so small, that they are neglected.

Q. Now, are there any forces applied as a result of the pipes which I see indicated at the left-hand side of the photograph. They are pipes, aren't they?

A. That's right, they are pipes.

Q. Do they create a force in any way on the derrick?

A. They do. The direction and magnitude of force depends [108] on wind velocities and the set back of the pipe. [109]

* * * * *

Q. All right, let's take the condition which is shown in the photograph at page 1921 of exhibit 1, and a wind velocity in the direction to the right of the exhibit as we view the photograph on page 1921. In other words, towards the back end of the

Plaintiffs' Exhibit No. 98—(Continued)

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derrick, and assume that you are loaded with a string of pipe such as one would normally encounter in operation, and state what the conditions of the various front and rear legs are with respect to the load.

A. In fact, we recommend that in any instances where they are working under conditions of high wind, that additional [110] guy lines be installed which will support the structure from all directions, but the structure as set up there with a—as I understand the question, would the wind coming into the front of the structure—the tendency would be to relieve the front legs of at least a part of the load.

Q. And part of the load would be taken by the rear legs? A. That's right.

Q. It would then pass through members 23-D and 23-E and down to the frame and through the jacks 33 and the outriggers to the ground?

A. That's right.

Q. Have you completed your answer now, Mr. Woody?

A. I believe so. At the moment we have introduced guy lines, loads, the effect of the dead line and the travelling block and noted that they put external guys up, or are instructed to, in case of heavy winds.

Q. Now, taking a condition where you have ordinary moderate winds, or no wind particularly, and considering the situation such as it may appear on

Plaintiffs' Exhibit No. 98—(Continued)

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page 1921, what is the relative nature of the load on the front and rear legs of the derrick?

A. The nature of that load is indeterminate. You have an elastic system. There is elasticity in the structure itself. You have elastic guy lines and under seemingly identical load conditions, the precise loading on the structure will vary from one set up location to the other. [111]

Q. It might be loaded in compression on the rear legs in the derrick in some cases, or it might be loaded in tension on the rear legs, is that correct?

A. Generally it will be in tension. There will be a degree of tension. That will vary.

Q. Would there be any condition under which it would be under compression? I am talking about the rear legs.

A. That's right, in cases where you have two lines to the rear a specified distance and only four lines to the block, and with wind forces not at the front, you might conceivably get compression. Now then in the single line loading from the same views you get compression in the rear legs. It is not a significant amount, but you definitely do get the rear legs in compression.

Q. Whether the rear legs are in compression, depends upon the rigging up that you do and the number of lines——

A. Right.

Q. ——the character of the wind——

A. Right.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. —character of wind velocity and the tension and the dead line and in the sand line?

A. Right.

Q. The front legs are always in compression, isn't that right?

A. Yes. In any working condition they must be.

Q. Now, there is one piece of information I haven't yet [112] obtained, that is the width of the cab. Let's draw that dimension in.

A. Let's scale it off of this other drawing. It would say it is $41\frac{1}{4}$ —41 inches. Let's see what this is. That measures about 36.

Q. As constructed you say it measures 41 inches, and scaled off on exhibit 3 it measures 36.

A. Yes, it was made wider at one time I believe, between the time this drawing was made and actual construction, but I don't recall.

Q. Will you write in between the arrows the word cab width. A. Right.

Q. On exhibit number 3. The truss formed of members 23-D, 23-E and the outriggers straddle the cab, one on one side and one on the other side, is that correct? A. 23-E is right.

Q. That includes also 23-D, does it not and the outriggers? A. When it is folded—

Q. Exhibit 24?

A. Right, in the folded position in View A, the entire outrigger assembly going down the highway is on the outside of the cab. [113]

* * * * *

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. We turn now to exhibit 4. The exhibit 4 represents another type of Drive-In unit?

A. Right.

Q. And can you identify it by its trade designation?

A. This is the one appearing on page 1884 of plaintiff's exhibit 1.

Q. In what way does the structure shown on exhibit 4, differ from the structure shown in exhibit 3?

A. Principally in the chassis, which is a single piece chassis. In other words, it is a single vehicle rather than a combination and the four axles are fixed to the chassis, the two at the front being steerable.

Q. Let's identify the chassis and the steerable wheels. A. The chassis is 1 again.

Q. May we use 201?

A. O.K. number 201 and the front steerable wheels will be 202 and the rear will be 202-A. [114]

Q. 202-A are the rear wheels of that?

A. The rear steerable wheels.

Q. Are 202-A steerable?

A. Right, these are differentially steerable. The suspensions is very similar to a rear bogie, which rigidly spaces the axles and hold the axles parallel at all times, so that it is only the wheels that turn.

Q. There is no central pivot, or fifth wheel construction through the front bogie as in the former exhibit 3? A. No.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. So the bogie members are fixed rigidly to the chassis 1, and the axles are fixed rigidly to the bogie?

A. The bogie suspension, right.

Q. And only the wheels are steerable on their rigid axles?

A. Right. That is the same bogie—or the front bogie set up that appears on a conventional truck on page 1889 of exhibit 1, that is the same steerable front axle bogie as is used on this vehicle in exhibit 4.

Q. Now, the construction, except for the differences you have just indicated, the construction and operation of this vehicle shown in exhibit 4 is identical with that shown, and which you have described in connection with exhibit 3, is that correct?

A. The vehicle isn't identical. The arrangement of the drive and components is similar. There is a great deal of [115] difference in the vehicle itself, because this is essentially a conventional truck unit, such as appears on page 1889, with the engine left out and placed in the rear and the reverse drive installed.

Q. Mr. Woody, as I understand exhibit 4, exhibit 4 represents a structure illustrated as you indicated on page 1884 of exhibit 1 and that the hinge axis 226 and its corresponding hinges is supported on the chassis 1, in the same manner as the hinge is supported on the chassis in exhibit 3, is that correct?

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. It is similarly—the principal support is the same. The details vary, but essentially it accomplishes the same thing.

Q. Is the framing of that support in the plane perpendicular to the drawing in exhibit 4, such as illustrated at the front view of exhibit 3, of the same construction as appears in exhibit 3?

A. It isn't the same construction. It is supposed to provide the same function. If I remember correctly the truss is not true and there is an area between the diagonal members there that must resist any truss loads in bending through there.

Q. If there is any substantial difference, I think we ought to have that difference in the record. I don't want to leave the record uncertain in that respect. I show you [116] drawing 27-482, which we will mark as exhibit 25 which you have just presented. At the extreme left of the drawing appears the framing for the support of the hinge 226, which we will mark 226 here.

A. That's right.

Q. Does that drawing show the differences to which you have just referred in the framing and support of the hinge?

A. Yes, it does, and contrary to my recollection, it appears that the hinge is complete, that is, if the center line of the diagonal brace, that corresponds to member 23-C in exhibit 3, is projected, it will intersect the center line of the front member of the chassis, approximately on its center.

Q. Will you mark that member 223-C.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. 223-C. Right.

Q. Now, except for that difference and the difference which you indicated in the construction of the chassis, are the structures shown on exhibit 4 and exhibit 3 substantially the same in structure and function?

A. They are. The materials are different, which is no functional difference.

Q. One is steel——

A. The size of the members and the forms of the members.

Q. I notice that the center line of the hinge 226, with respect to the center line of the axle of wheel 202, is such that the axis of the hinge 226 is forward, toward the front [117] of the vehicle, from the vertical axis of the axle of wheel 202, is that correct?

A. That is to the best of my knowledge substantially correct. The vehicle you are looking at here has only been legal in one State, that is Oklahoma, since the front overhang is in the neighborhood of seven feet, and that is the reason for the movement of the hinge ahead of the front axle.

Q. Where is the front of the chassis, Mr. Woody, in this drawing? A. Right there.

Q. Will you mark it with some number?

A. 203 would be all right. 203, that is the front of the chassis.

Q. Can you tell us the distance between the

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

vertical line passing through 226-A and vertical line 202-A is?

A. 226 is again approximately eight feet from the ground line. It usually is within two inches either way.

Q. I am talking about the distance between line 226-A and 202-A.

A. I beg your pardon.

Q. Which I have just marked with such numbers.

A. According to the drawing it is approximately two inches.

Q. I show you a photograph on page 1884 of plaintiff's exhibit 1, in which the hinge 226 is also forward of the front axle of the wheel, corresponding to 202 here on exhibit 4. [118] Can you tell us what the distance is that separates the hinge from the center line of the axle on that wheel.

A. That distance should be the same as shown in the drawing just referred to.

Q. Is the structure shown on page 1884 an actual photograph?

A. It is from an actual photograph. It may have had some artist's work done on it, but it is from an actual photograph.

Q. In that structure on page 1884, is the hinge point ahead or behind the 203 of the chassis?

A. It is to the rear of that of necessity.

* * * * *

Q. (By Mr. Subkow): Mr. Woody, we have been

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

handed a series of photographs through your counsel, Mr. Crowley. Will you identify these photographs and what they show?

A. This first photograph is an over-the-road view of the unit appearing on page 1883 on exhibit 1.

Q. We will mark that exhibit the next in number, exhibit 26. Mr. Woody, that structure is a photograph of a structure manufactured and sold——

A. By Franks.

Q. ——by Franks?

A. Yes, Franks Manufacturing Corporation.

Q. The corporation before the merger? [119]

A. Right. This photograph is one of the unit described on page 1884 of exhibit 1, and was manufactured and delivered by Franks Division of Cabot Shops, after the merger.

Q. Mark this as exhibit 27.

A. This photograph is a close-up view, three-quarter front close up view of the same unit, appearing on photograph exhibit 27, showing the outriggers and the derrick legs positioned on supporting pedestal.

Q. We will mark this exhibit plaintiff's exhibit 28. Mr. Woody, in common with all of the derrick structures to which you have testified heretofore, is it true that they, as well as this, show an unbraced section, between the front legs of the derrick, between the pedestal under the front legs there, a

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

cross member which I will mark as A on exhibit 28, is that correct?

A. That is correct. In other words, you mean that there is a window there so that the legs can straddle?

Q. Yes, and a person inside the cab can look straight through?

A. They could, although it is to straddle the frame of the structure generally. This same derrick structure may be used on several units, and the clearance is necessary to straddle the frame. It is a construction that we have used for years. [120]

Q. Will you mark the next one exhibit 29. I will ask the reporter to mark the next three exhibits in order, 30, 31 and 32. I hand you exhibit 30 and ask you to identify the structure shown in that photograph.

A. That is essentially—it is the same—well, it is the identical unit I think to the one shown on exhibit 26.

Q. Showing the derrick in the erect position but not extended?

A. Right, and it is from the opposite side.

Q. Photographed from the rear end.

A. Yes, it is a three-quarter rear view from the opposite side.

Q. Will you identify the structure shown in exhibit 31?

A. The structure shown in exhibit 31 is the same unit as in exhibit 27, and essentially the same

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

view as exhibit 28, except it is—wait a minute—it is taken from the same side. This is, you might say, a three-quarter rear view, where this exhibit 28 is a three-quarter front view.

Q. Now, will you identify the structure shown in exhibit 32?

A. 32, that is the same unit as described on page 1883 of exhibit 1. It is not identically the same unit as 26 but it is similar.

Q. Showing the outriggers in position?

A. In position.

Q. And the derrick erected? [121]

A. Right.

Q. The structure which is in exhibit 32, to which the men are paying attention, is connected to the lines going to the crown, is that right?

A. Right. They have a rod elevator on there, tied on to a rod, getting ready to hoist it.

Q. I call your attention now to a series of exhibits, 5 and 21, which you have previously identified, I believe, as the unit which is illustrated and described on page—we are now talking about exhibit 21,—which is a unit which is shown on page 1810.

A. No, 21 is this unit here as shown on 1809 of exhibit 2. Now, this is the Dart chassis.

Q. In completing the statement I meant when I said page 1810, I was referring to exhibit 2. I call your attention, Mr. Woody, to the fact that there are two front wheels under the cab in exhibit

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

2, while on 1809 we have four front wheels.

A. There was one chassis built, the same as 1809, except that it has a single front axle and this represents that chassis.

Q. "This" being exhibit 21?

A. Right, represents that chassis.

Q. Does exhibit 5 correspond to the structure shown on page 1810 of exhibit 2?

A. No, it is a later version. It is intended to represent a chassis that hasn't been built, which would be the same as the chassis shown on page 1884 of exhibit 1, but with only [122] one front axle instead of two.

Q. This is merely a theoretical design and the weights and balances which appear on it are merely theoretical weights and balances? A. Right.

Q. But which have not been tested by experience or practice?

A. That's right, it has never been built.

Q. Did I understand your testimony previously to be that exhibit 17 is the photograph of a structure with two front wheels which correspond to the structure shown on page 1810, of exhibit 2? [123]

* * * * *

Q. All right. Now, Mr. Woody, what was the first Drive-In structure which you built?

A. Well, the first one that we actually constructed was built in 1952, or was completed in 1952.

Q. The first structure completed in 1952, did it represent a form of exhibit 3, or exhibit 4, or ex-

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Exhibit 20? A. It was 3. [125]

Q. Exhibit 3, and I notice on exhibit 3, that it bears a date of 9-3-50. A. Right.

Q. Can you state whether that structure was completed prior to that date, or after that date? Can you give us that date, if you know?

A. The completion and manufacture?

Q. Yes, sir.

A. The completion and manufacture was in the middle of '52.

Mr. Crowley: I must make note, Mr. Subkow, that Mr. Woody just testified to that.

Mr. Subkow: I am sorry.

Mr. Crowley: And the delay has been considerable.

Q. When did you start the design of the structure that was completed in 1952?

A. Oh, the first work was probably done in '49 or maybe even before '49, and it was only initiated after exhausting the possibilities of other approaches, that is through trailer vehicles which were supposed to be an answer to the legal problem, but it developed that they are no solution of legality, and that the only conceivable way of producing the equipment that we were most hurt on and the industry was most hurt on, was to simplify and eliminate all duplications and that is what we had in mind in attacking the problem. It wasn't just a new design. It was a development that was initiated by the highway enforcement officials. [126]

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. The problem which led to the design of the Drive-In unit by the Franks Manufacturing Corporation, with which you had much to do, arose from the fact that the Back-In units were not legal on the road in many states, is that correct?

A. Yes.

Q. When did that problem first arise?

A. The night that the Japanese surrendered, the patrolmen seemed to come out of the bushes and byways along every highway in the country.

Q. That was about September of 1945?

A. Right.

Q. When that occurred, what did Franks Manufacturing do about trying to solve that problem?

A. The first step was to try to reduce the weight of existing equipment, and it became evident that that was definitely limited. The next step was to try to provide more axles by utilizing semi-trailers, in which you would have at least two axles on the semi-trailer itself and two on the rear of the towing tractor and still a third steering axle on the towing tractor, but that didn't work out, and from an overall study, it became necessary to eliminate some of the things that we had been using. Well, one of the first things——

Q. May I interrupt. Is there some catalog where we could identify that semi-trailer construction that you are referring to? [127]

A. I don't know. We may have put them in the catalogs. The fact of the matter, as far as the semi-

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

trailer unit, if you have a 38 catalog—it isn't a service unit but—I think this is actually a semi-trailer unit, yes, there is one right there.

Q. You are now pointing to the photograph on page 3 of Franks Manufacturing catalog?

A. Yes.

Q. Introduce that as plaintiff's exhibit 33. Go ahead.

A. The trailer units, whether full trailers or semi-trailers, — this design here was officially full trailer—the semi-trailer didn't solve the problem, because your gross weight, since you have to have a separate entity such as a towing tractor to move it, your gross weight actually goes up when you employ a semi-trailer, and on account of the restrictions on overall length, you are right back where you were, to conform with the highway laws again, to be strictly legal——

Q. That was no solution either?

A. That was no solution either.

Q. Then what did you do?

A. And the study of the problem revealed that the only way the large equipment could be made legal, was by simplification and elimination of components in the conventional truck line. Then we mounted our product on a frame and we set that [128] frame on top of another frame, which is the chassis frame of the vehicle and that construction doesn't lend itself to the most economical use, therefore, if we could use one single frame to support

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

both hoist and—or as both a hoist frame and a chassis frame, we could eliminate that component.

Q. By mounting the hoist directly on the chassis?

A. On the chassis frame. Then by simplifying the drive so that we could make one component maybe perform the function of two components—

Q. For example, if one could drive the hoist and also drive the vehicle?

A. Right, and by eliminating all components that were not strictly essential, it seemed possible by careful design to achieve strict legality.

Q. Did you make such a design?

A. We eventually did. We were at it by spells, over a period of several years.

Q. That is the design that we have now seen, exhibit 3? A. Right.

Q. When did you first decide to mount the cab at the front of the vehicle and the engine at the rear of the vehicle and to turn the derrick around, so that the front would be on the back of the vehicle and the bottom and the legs on the front of the vehicle?

A. That was done when we had exhausted other [129] possibilities and on the final analysis, we took the California highway law book, just opened it and set down the governing conditions, and when we came to the three foot front overhang, the only reasonable way of achieving that was that had to be—

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. The front end—

A. ———of the derrick, of the cab, had to go on that end.

Q. When did you come to that decision? Can you fix the time when you came to that decision?

A. That was probably in '49,—'48,—late '48 or '49.

Q. By that time had you heard of the design of the Drive-In derrick that Jim Moon had made?

A. I think I had. The fact of the matter, Jim and I had discussed that several years before. [130]

* * * * *

Mr. Crowley: Let me state that I believe what Mr. Woody means, is exhibit 8 of the Moon deposition, which is presumably on its way here from Boston.

Q. Do you know when you received that?

A. No, and I don't know how long it had been in the organization when it was turned over to me.

Q. Who gave you that brochure?

A. I believe it was Carl White.

Q. Do you know when he handed that brochure to you?

A. No, I don't. I think that he had had it—I am under the impression that he had had it for some time when he did.

Q. Was it handed to you during the period you were trying to solve the problem to which you have referred, and during the period you were trying the various solutions with the Back-In unit?

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. I don't believe so. As I recall it was afterwards. [133] He had, shall we say, grown tired of keeping it or doing whatever he might have done with it. He turned it over to me for filing purposes.

Q. Who is Mr. Carl White?

A. He was president of the old Franks Manufacturing Corporation.

Q. Is he the Carl White who is the patentee of patent number 2 204 713? A. Yes.

Q. And is the Franks Manufacturing Corporation, the assignee, the Franks Manufacturing Corporation, about which we have been testifying?

A. Yes.

Mr. Subkow: We offer this patent 2 204 713 as plaintiff's exhibit 37. [134]

* * * * *

Q. When you decided to build a portable derrick, of the Drive-In type, what was your first idea for a construction of that design, can you recall?

A. I think that I made some preliminary sketches, that had to do with details rather than generalities, and then along about that time, I was shunted off on another project, and at that time we had an engineer in California, that worked on a great many different schemes over a period of, oh, perhaps a year.

Q. What was the name of that company who worked on these various schemes for the Drive-In design, is that right?

A. Well, I believe that most of those were

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Drive-In models and generally I considered all the designs that they produced unsatisfactory and short of accomplishing the purpose that needed to be accomplished.

Q. What was the name of that engineer, Mr. Woody? A. Mr. Aular.

Q. Is he employed with Franks now?

A. No, not now. He is retired.

Q. Where does he live?

A. He lives in Tulsa. Oh, I don't know that those tracings,—they made their own drawings out there and I don't know that those are still in existence, because we didn't utilize any of them.

Q. Do you know his address in Tulsa?

A. I don't know it, but it should be in the phone book.

Q. Can you from memory reproduce the various designs that he proposed in the form of sketches?

A. Generally he had the engine cross-mounted with the chain drive from here to there and they were complicated. They didn't follow the pattern of design that we had established through the years which is an in-line drive from your engine to a right angle gear box, into the hoist, and that arrangement we have used it on both trucks mounted and skid units. It has been a trade-mark of Franks' design. It is generally for the engine in line with the longitudinal axis of the unit.

Q. How did he mount his derrick?

A. I don't recall. Most of them were not too

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

much in detail, but it was just shown up over the rig as I recall it.

Q. He did not develop any hinge mounting of any kind?

A. He probably showed—I don't remember anything—I don't recall a thing that was unusual about it. He probably showed the same or similar hinge mounting as had been used on the truck jobs.

Q. On the Back-In truck jobs? A. Yes.

Q. Where did he mount the cab?

A. I don't recall whether or not he had an enclosed cab on his designs.

Q. Where did the driver sit?

A. He sat towards the rear end. Now the older design had a narrow hinge point and he probably sat alongside the outside of that. [137] There wasn't room enough for a cab behind.

Q. In other words, what he did was to take the Back-In device and instead of backing it in, he drove it so that the back end of the Back-In device was now at the front end of it.

A. I think that was about the approach he used, as far as the derrick mounting is concerned.

Q. Let's take a Back-In unit here and in red pencil can you make the changes which conforms to Mr. Aular's suggested design?

A. Maybe there is a photograph that would be better. You can't see any depth there.

Q. Well, I think we can take exhibit 1 or 2.

A. Here is what I am talking about right here.

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(Deposition of Wayland B. Woody.)

Here is the older design. See the hinges were in a closer space, that spacing was in use years ago, and there was considerable space between that point and the outside of the frame, and I believe that that at least in one instance, one of his proposals that he utilized that space.

Q. You are talking with respect to the photograph on page 11 of Franks Manufacturing Corporation's catalog 42? A. Right.

Q. Just let's us mark that so we can talk about that, as the exhibit next in number. Now, will you with a red pencil or in ink, describe again and mark the places to which you made previous reference?

A. There is the brace. Between the brace X and the outside of the bed Y, there is a little short—oh, three feet of space that might be utilized.

Q. Transversely of the vehicle?

A. Transversely of the vehicle that might be utilized as an operating job for driving the vehicle. That actual part of it never came into too much discussion because the hoist drive and the mechanical components were never satisfactorily arranged.

Q. What year was that now?

A. That was probably 1949 and the early part of '50.

Q. The latter part of '49 or early part of '50?

A. Probably, because that drawing was made in '50.

Q. That drawing is in exhibit 3?

A. Yes, and that was summarizing a conference

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

between ourselves and the truck manufacturers as to the arrangement of the vehicles.

Q. Could you locate—you can't locate the depth there, excuse me. Exhibit 3 does not correspond to the front of the structure shown on page 11, does it?

A. No, this one is later and we don't have one that does.

Q. How far back of the end of the chassis is position X and position Y on page 11?

A. Those extend normally, longitudinally there is five to six feet of space in there that was available for cargo or [139] any purpose that might be desirable to use this for.

Q. So that essentially what you are talking about, is that the Back-In unit would have run forward, by putting the drive wheels and tires at the back of the Back-In unit thus making it a Drive-In unit, is that correct?

A. Well, the wheels were reversed. What had been the back end had a steerable axle on it and I believe that those were generally three axle vehicles in the sketch. Now, I may be wrong on that.

Q. And you disagreed on that?

A. I did especially. I didn't give much consideration to the derrick installation of that part of it, the driving feature, because it was unsatisfactory before it got to drive the hoist, which is the prime function in building equipment of that kind.

Q. Did the ends of the legs in Mr. Aulur's design, extend beyond the end of the chassis, which

Plaintiffs' Exhibit No. 98—(Continued)

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is now the front of the end of the chassis, the regular amount?

A. I believe that he had bumpers set out there, some means of controlling that front overhang. I believe he did.

Q. But the distance from the hinge point to the end of the rig, was it greater than you have on design exhibit 3? Was it still about eight feet?

A. It is very likely—that dimension has been near the same for years. [140]

Q. And it was so, about eight feet, in Mr. Aulur's design?

A. I would say it was, very likely.

Q. When did you first decide to modify that so that the distance from the hinge point to the end of the derrick in the roadable position, was different from that eight feet and more like the form that is in the exhibit 3?

A. The narrow hinge spacing was originally established in 1937, and the structure that was built at that time was a forty-five foot single piece structure, but through the method of standardization, the size of the structure had grown and grown, and as I recall there was a 31½ inch spacing between the hinges which was done for a purpose at the time.

Q. May I interrupt just a moment to ask you whether you are talking now about the hinge point shown at 55 in the Woody patent 2 204 716?

A. That's right, inset as shown on that patent.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. And that represents the type of structure and hinge to which you have referred in connection with your exhibit 39 at page 11? A. Right.

Q. You are the Mr. Woody, who is patentee of the patent 2 204 716? A. The same.

Mr. Subkow: I will offer that as the exhibit next in number, 40. [141]

Q. Go ahead.

A. Well, we had always on the drilling derricks, had wide spaced hinge points, out near the eight foot limit approximately, directly beneath the legs, but on account of as I recall, working under a standard derrick there was one of these, and another one was where a customer wanted to use reaving sheaves and the initial design, the close spaced hinge points were used, and it finally became evident, that a 31½ inch spread, didn't give very much stability to a 96 foot structure, and we changed over one or two units in the field, and were tending toward spreading those hinges anyway, so that when it came an opportunity to re-design, the derrick structure was made completely different. The hinges were spread out to give it stability.

Q. Was that one of the changes and advances which were occasioned by putting the cab in the front? Was that the beginning consideration, to spread out the hinge points, thus straddling the cab and thus giving you a more stable structure than you had obtained in the Back-In units?

A. That was right. Since we were departing

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)
from standard in one respect, we just departed all the way.

Q. In other words, to make a major change that would improve the structure stability.

A. Right.

Q. In the stability character of the structure.

A. Right. [142]

Q. What was the other consideration you next had in making this change?

A. You mean the change to the Drive-In?

Q. To the Drive-In from the Back-In structure.

A. Of course, as I said previously the prime motive was the legal code book that said three feet overhang is all you can have legally, and customers were insistent on legal equipment. They wanted it legal from the manufacturer at least. If it was to be made illegal they wanted the privilege of doing that themselves. So that determined which end was changed.

Q. Why in the Back-In unit, couldn't you have made the overhang in the front end of the vehicle legal, completely overhang by three feet overhang?

A. It could have been done if we had been willing to change our basic structure, but we have stayed largely to the concept of a structure that goes all the way to the ground, and we like to see those front legs go to the ground in one piece, and to depart from that would mean a change in our basic concept, and we were unwilling to do that.

Q. In other words, in a Back-In unit, if you had

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(Deposition of Wayland B. Woody.)

moved the derrick rearwardly, so that the overhang would not be more than three feet, it would stick out in the back of the unit—— A. Right. [143]

Q. ——too far, and when you elevated it, it would be too long—— A. Yes.

Q. ——and you would have to sectionalize it.

A. We didn't want to sectionalize it.

Q. If you didn't sectionalize it, it would also overhang beyond the legal limit in the larger size, wouldn't it?

A. It likely would, if you maintained a legal single unit.

Q. So that both from the legal and the practical point of view, it was impossible to make the Back-In unit legally functional on the design?

A. It wasn't exactly impossible, but we considered it impractical and we were unwilling to do the things that would have been necessary.

Q. All right. So that the next consideration that you considered was, by mounting the cab in front and having a Drive-In unit, you could make a legal unit on the road, as far as overhang front and rear was concerned, is that correct? A. Right.

Q. What else did it give you?

A. Well, we got out of it, not that it couldn't have been gotten from a conventional type unit, but we did get out of it a single frame instead of a double frame.

Q. Didn't it also permit you, because you had a free extent of chassis to permit you to move the

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

hoist and motor power [144] in such a way to get legal distribution of weights?

A. Well, we have a great deal of freedom on the conventional Back-In truck mounted unit. The only thing is that we don't have enough carrying capacity.

Q. On the Back-In unit?

A. On the Back-In unit, we don't have enough legal carrying capacity. We get all the axles loaded and we still got some left over.

Q. But that is not so in the case of the Drive-In unit?

A. By careful design and control, you can make the big units legal.

Q. So that the Drive-In unit can be made legal, both from the point of view of overhang and from the point of view of weight and balance distribution on the axles? A. Right.

Q. And also on erection you get a stable structure? A. Unh huh.

Q. Your answer is yes, Mr. Woody?

A. Yes. It is not necessarily more stable, but it can give you a stable structure, that's right. [145]
* * * * *

Q. (By Mr. Subkow): Mr. Woody, what effect did the design of the Drive-In unit have upon the ease of positioning the unit, as compared to the Back-In unit?

A. It improved the ability to spot the unit ini-

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

tially at the well and increased the difficulty, in many cases, of getting away from the well.

Q. Will you explain what you mean by improving the ease of spotting the unit?

A. Since the operator in a position—I mean the driver was in a position to see the point to which he was driving, he could drive the vehicle up to the well, without relying upon signals from another man, although he still has another man there to gauge the distance from the polish rod. [146]

* * * * *

Q. Do you agree with this statement which appears on page 3 of Franks Manufacturing Clipper, which I will ask the reporter to mark as the exhibit next in number. First, can you tell me what this is, exhibit 41.

A. It is a brochure prepared by our advertising and sales department, to promote the sale of the Clipper unit.

Q. That is the Franks Drive-In unit?

A. Right.

Q. I read to you, as you will read with you, the [149] following statement which appears on the bottom of page 3 of exhibit 41, the second sentence which reads: "Clear vision at all times combined with freedom of movement makes for greater safety as well as operating speed and efficiency". Do you agree with that statement?

A. Yes. That statement though is not referring to the drive-in feature.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. What is it referring to?

A. That is referring to the fact that the derrick is tilted, to give working room ahead of the structure and the unit is controlled from a movable station, that can be placed in any position of best visibility within certain limits, around the well.

Q. The clear vision to which reference is made, is not meant to be the clear vision of the driver inside the cab?

A. No, it is the operator of the trailer, whatever you want to call him.

Q. It is a fact, however, is it not, that because of the construction of the truss member 23, 23-C, 25, and 23-A, that a porthole is created to give the driver clear vision as he drives?

A. As he drives to location, yes.

Q. That appears as shown on the photograph on page 2 of the exhibit 41?

A. Right. [150]

* * * * *

Q. Then the statement which appears on page 2, of exhibit 41, which states that "Outriggers with 18-ft. spread, supported by hydraulic jack legs, stabilize raising and extending, eliminating all guying except to front of vehicle," is in your opinion a misrepresentation of fact?

A. It is an overstatement. It is an overstatement. In theory from the weights involved and the points of support, the structure will stand with the floor full of pipe at I believe—I can't quote the precise figure, but I believe it [152] is around a

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

seventy miles an hour actual wind velocity. It will still have a margin of support left.

Q. Which advantage is not true in the Back-In type?

A. No, it wouldn't have the widespread base that means stability, which was the thing behind installing the outriggers.

Q. When you said "no", were you agreeing with my statement—

A. That the Back-In unit did not have the stability that this one does? I will agree with you.

Q. You say you agree with me?

A. I agree with you that it did not have the stability. [153]

* * * * *

Q. Now, for a like unit, I mean equal, like Back-In unit, for the same horsepower and derrick size and other comparable features, would the weight distribution on the back and front wheels meet the legal requirements which the equivalent Drive-In structure would meet?

A. Not by stabilizing a standard chassis they wouldn't, because you would have that duplicate frame work in the standard chassis, weight components that you don't need that are of [154] value to the highway operation.

Q. Referring to the structure exhibit 3, and the truss frame work which supports the hinge and creates the porthole for the driver, does that create

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

any safety features which are of any importance in this structure?

A. Well, not actually, that I can think of. If I understand what you may refer to, you mean as respect to——

Q. Well, was this truss work designed for any purpose other than loading support?

A. No, that was—it was designed to give an adequate truss work outlook here to support and stabilize that derrick part over the road and in the upright position.

Q. In case of a turning over of the cab——

A. It is adequate to more than support the weight that normally is below and that would be on top of it.

Q. ——and it does protect the driver?

A. That's right. Those hinges will probably,—well, they will carry with a fair margin, 60,000 pounds, which means that at failure it would be around 120,000 pounds and the most that you would have on them if you upset it completely is about—oh, you might have 20,000 pounds.

Q. So that that structure is a safety feature, with respect to the driver, in case of an accident, such as a turn over?

A. It is. That was a byproduct, not purpose.

Q. But you got that advantage? [155]

A. Yes.

Q. Now, Mr. Aulur's design, that would be the modification you described in connection with page

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

11, of exhibit 39, in case of a turn over, would the driver in that design, have had the protection which you gave him in the design of exhibit 3?

A. He wouldn't have had as much.

Q. He might have been in serious danger, might he not?

A. Under certain circumstances he could have been, yes.

Q. What other safety provision did you build into this structure?

A. Well, the outriggers were a safety measure; all the jacks are a safety measure; in considering the frame design for instance, it was designed with the new jack support so that it is adequate to support the load without even the stabilizing jacks under the ram.

Q. Was there also a safety feature in the fact that you were designing a structure, so that the deflection which would occur, by reason of the raising loads, would not cause any overturning moment, that would tend to tip the structure and make it fall over on its side?

A. That's right. The outriggers that add on to this truss that goes through there, gives you a broad base, then this 23-E gives a truss back to the point at which the frame is developing its maximum section, so that you have got all of [156] that tied together in an integral unit.

Q. So that the structure which is defined between points 36 and the jacks 33 and the hinge

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

point 26 prime, including the outriggers, makes a stable platform, so that deflection is taken out, so overturning moment of the structure cannot occur, is that correct? A. Yes.

Q. Is that true in the Back-In unit using the sort of mechanism of the Woody patent, to which we have referred?

A. It wasn't as true with it, for the simple reason that it didn't have as broad a base, and it didn't have as rigid a frame. That is another thing. [157]
* * * * *

Q. Would it be possible to employ in the Drive-In mechanism, the screw raising mechanism of the Woody patent, which you used in the Back-In unit?

A. Not without modification. It could have been used.

Q. But if used, it would stick too far forward from the front of the——

A. That is correct, I would say, yes. [158]
* * * * *

Q. As a matter of fact, Mr. Woody, isn't it true that before you used a screw raising mechanism for a Back-In type, that you did use hydraulic jacks?

A. That's right.

Q. I show you a catalog, another Franks Units, on which in the upper—which I am going to ask the reporter to mark as the exhibit next in number (42).

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

A. The preliminary design was done in 1936 and construction was finished in March, I believe, of '37, that one unit right there.

Q. You are pointing at the front page, in the lower photograph, that shows a Back-In type, with extended hydraulic jacks for lifting the derrick?

A. Right. [159]

Q. There is also a further showing of such a structure on page 3.

A. In the over-the-road position.

Q. What kind of jacks were those?

A. Those were hydraulic multistage jacks.

Q. Referring back to exhibit 33, at page 10, it also shows the same structure as shown on page 3, of exhibit 42, is that correct? A. Yes, right.

Q. Now that was also a double acting——

A. Right.

Q. ——similar in character to the jacks that you are using on the Drive-In unit now?

A. Right.

Q. You however discontinued using these hydraulic jacks? A. Right.

Q. And you went to the power screwed type?

A. Here is one of the early units with the power screw.

Q. That is on the front page of exhibit 33.

A. I believe that we built the first power screw units in 1937.

Q. You then abandoned the use of the hydraulic jacks?

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. Except on the units that were already designed and for a time we built both.

Q. Then you discontinued using the hydraulic lifting [160] mechanism? A. Right.

Q. And went to the power screw type, which is shown in the Woody patent, to which we have referred? A. Yes. [161]

* * * * *

Q. Isn't it also true, that the structures shown in exhibit 42, are much lighter, and that the derricks are much lighter construction, than in the big telescopic derrick of the Drive-In type?

A. They were lighter derricks, during that development period each screw structure was apt to be just a little bit bigger than the one before.

Q. And the danger of which Mr. White was aware, would become more pronounced——

A. That's right.

Q. ——in the telescopic derrick?

A. That's right.

Q. And that was another reason why you abandoned the hydraulic lifting mechanism and went to the screw mechanism? A. That's right. [162]

* * * * *

Q. (By Mr. Subkow): Mr. Woody, I call your attention to plaintiff's exhibit 19, the Dart Truck Company photograph. A. Right.

Q. You were making some investigation to find if you had any correspondence available relating to this design.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

A. I checked, and the story that I got, was that it was most all verbal; that at the API meeting in 1952, representatives of Dart Truck Company, contacted some of our people who were in Chicago, and as a result of that, Dart came up with this idea here, or with that conception. It would seem that just judging from some of the details that I see there, they probably had a photograph of some kind to look at. Now, I am quite sure that they didn't know enough about the equipment to produce even as logical a drawing as they did without something as a suggestion. I see a little bit of the form of the larger unit in that hoist, so they probably had some picture of it, or——

Q. Was that of the Back-In type you are talking about?

A. No, that was Drive-In—well, no it could be either one, because what I was going by is this, what should be a [165] cathead.

Q. The markings that you are pointing to there——

A. This should be a cathead here. It actually doesn't represent too much of anything.

Q. Could the record show that the witness has marked the item to which he has been referring with the letter A and a lead line.

A. That form could be—well, that is the general form of all of our winches. This could be a simple jack shaft.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. Will you identify the item to which you were making reference symbol?

A. Well, the flange could represent the end of the jack shaft, and B & C were doubtless intended to represent a shaft and to indicate a drum position.

Q. Mr. Woody, did you have any discussions with the Dart Truck Company with respect to this photograph, plaintiff's exhibit 19?

A. Well, they were in the plant here, as I recall, probably in January of 1953. By that time I had seen a copy of this wash drawing, and as I recall, was not too favorably impressed.

Q. Then you did have discussions with the representatives of the Dart Company? A. Right.

Q. And did they describe to you what this construction was supposed to be? [166]

A. That's right.

Q. All right. Then can you tell us if the derrick which I will mark with D,—is this correct, is that the derrick?

A. That is supposed to be. That is their conception.

Q. How it was mounted upon the truck? How it was supposed to be mounted?

A. This was not built. It was never built.

Q. How it was supposed to be mounted on the truck then?

A. They had the derrick mounted with the base toward the front end, in other words, it was a Drive-In vehicle.

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. Yes.

A. And they had the hinge axis, so it would appear, some distance back of the cab.

Q. You are marking the hinge axis with D. Would you mark it D-1. I think we have D.

A. Yes, D-1, or D prime.

Q. The hinge also appears at another place?

A. This is the same.

Q. Mark it. A. D-1 again.

Q. How was the derrick supposed to be lifted?

A. They show some hydraulic cylinders sitting on some rigid brackets.

Q. Would you mark the hydraulic cylinders.

A. They would have had to either bend or tear the structure [167] in two to raise it. The hydraulic cylinder is E.

Q. I point to another item here, which I will mark F. Will you tell me what that is supposed to be, according to the representatives of the Dart Company? I have marked it with the symbol F.

A. The representation of item F isn't too clear, because it isn't practical, but I would assume that they intended to show some form of support. The hinge and member F would be one of the principal supports for that.

Q. So that as I understand their design, it was intended by some means to have the cylinder E rotate the derrick about the hinge D prime——

A. That is correct.

Q. ——to an erect position. The horizontal dis-

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

tance between the two front legs D-2, — I have marked the other front leg as D-2, is that correct, Mr. Woody? A. That's right.

Q. The horizontal distance between the front legs D-2, were they supposed to be greater or less than the horizontal distance between the two sides on the end of the chassis E-1?

A. Well, personally I think that the artist was not familiar enough with what he was trying to do, to take recognition of that. The distance between the two points E-1 would of necessity be near eight feet. The derrick structure is shown as being no more, and possibly less, so that in [168] actual practice, in erecting the derrick, it would be necessary to cut slices through the front tires and bumper and sheet metal work there.

Q. Isn't it true, Mr. Woody, that these artists' representations which are made as introductory to the offer of the structure for sale, are not intended to be teachings of how it is constructed?

A. That's right.

Mr. Crowley: Object to the question. I would like to have Mr. Subkow relate the question to the exhibit now being examined. Mr. Woody is not qualified as an expert in analyzing artists' representations. He is a qualified engineer.

Q. We have Mr. Woody's answer.

A. Right.

Q. With respect to this Dart structure, you said you did have some correspondence at one time, but

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

you haven't been able to find it, is that right?

A. I am afraid that most of that communication was by telephone and personal contact.

Q. Do you know whether there ever was anything in writing, in the form of correspondence, or reports, to the Franks Manufacturing Corporation, with respect to this Dart Truck Company suggestion?

A. There may have been with Carl White, although he was [169] inclined to use the telephone quite a bit.

Q. Have you any personal recollection of ever seeing any correspondence or written reports of any kind, relating to this structure on exhibit 19?

A. No, it was presented to me and I had my verbal comments on two or three occasions. Now, as an explanation, probably the only reason that we ever had Dart build a chassis for us was because we had the '53 Oil Show coming up, they wanted to have some equipment in the Oil Show and Kenworth took on a—well, it was a contract that atomic gun towers and production was tied up and we were unable to get delivery of a Kenworth chassis, and when that became evident, then all at once with this desire of Dart to produce equipment a matter of record, it became of extreme importance that we get something for the Show, so I was delegated to go to the Dart Truck Company and work out in conjunction with their engineer something that we could use and could show, and they furnished the first chassis, they

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

built it at their own responsibility and furnished it through the Oil show at no expense to Franks, until such time as the entire equipment was sold.

Q. And that was the structure which is shown on the photograph——

A. If we get exhibit 2 I can identify it there. There is the one shown on page 1809 of exhibit 2.

* * * * *

Mr. Subkow: Sure. May it be stipulated, Mr. Crowley, that the photograph which I will ask the reporter to mark as the exhibit next in number (marked 43) is a side view of Franks Manufacturing Corporation's Back-In unit. Will you stipulate, Mr. Crowley, that this is a side view of a Back-In unit as erected?

Mr. Crowley: I will stipulate and go further, it is a Franks' Back-In unit as erected, but it is not the [172] same as the prior exhibit.

Mr. Subkow: All right. Catalog 40, which I will ask the reporter to mark as the exhibit next in number (45). Will you stipulate that it is a catalog issued by Franks Manufacturing Corporation, prior to the merger?

Mr. Crowley: Yes, certainly.

Mr. Subkow: Will you stipulate that plaintiff's exhibit 46, catalog 53, is a catalog issued by Franks Manufacturing Corporation prior to the merger?

Mr. Crowley: Yes.

Mr. Subkow: Will you stipulate that exhibit 47

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

is a patent issued to Mr. C. J. Moon, who is the James Moon, one of the plaintiffs in this action?

Mr. Crowley: Yes, and assigned to Franks Manufacturing Corporation.

Mr. Subkow: And assigned to Franks Manufacturing Corporation, number 2 240 852, is that correct?

Mr. Crowley: It would seem so, yes.

Mr. Subkow: It is stipulated that the tear sheet, which I will ask the reporter to mark as plaintiff's exhibit 48, is a tear sheet from the Oil and Gas Journal, published since the acquisition of Franks Manufacturing Corporation by the defendant, and I will state for the record that the pencil notation May 6, 1957, Oil and Gas Journal, was placed upon this document by myself, from information supplied me by Mr. [173] Moon. The exhibit is offered without the pencil notations, but may it go in as so stipulated, Mr. Crowley?

Mr. Crowley: O.K.

Q. Mr. Woody, we have introduced into the record certain exhibits, one of which is catalog 53, exhibit 46. Turn to page 21. Can you identify the structure New Franks Clipper appearing on that page 21, was such a structure ever built by defendant, or its predecessor, Franks Manufacturing Corporation?

A. That is essentially the structure that was built on the Kenworth chassis as appears on the cover of exhibit 2, and on page 1807, the differences

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

between the two being due to art work that had been performed on both.

Q. The structure as shown on page 21——

A. The derrick supports are——

Q. Please mark them, Mr. Woody, so that we will have it of record.

A. The derrick supports as shown here are artist's faking. In other words, this photograph here was made from a composite of chassis photographs, derrick photographs and artist's imagination.

Q. In other words, the structure as shown, did not exist when the artist made the drawing?

A. That's right. [174]

* * * * *

Q. Now, I show you a print of a letter, dated September 20, 1946, and a sketch, which I am going to ask the reporter to mark as exhibit 49 for the letter, and 49-A for the sketch. Can you identify these documents? [177]

A. They are copies of material that was in my file, and have been ever since the date of the letter.

Q. And exhibit 49 is a copy of a letter which you addressed on or about September 20, 1946 and sent to Mr. Carl White, Jr., president of Franks Manufacturing Corporation? A. Right.

Q. The original of which was signed by you?

A. Right.

Q. And did that letter include a sketch, exhibit 49-A?

A. Right. It is a comment on the sketch 49-A.
Correction.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. The sketch 49-A accompanied the letter exhibit 49?

A. The sketch 49-A had been sent to me presumably by Mr. White for comment and the letter was written in comment of the sketch 49-A.

Q. Have you the correspondence from Mr. White with respect to your incorporating the sketch 49-A?

A. I do not. It was his custom to send letters to me with notations on the side, on which I made comments, and returned to him.

Q. Do you know whose handwriting the calculations on 49-A is, that is the 90'x 225,000 pounds, etc?

A. That appears to be my handwriting. It may be a notation of verbal information was given me. I may not have been given anything but the sketch and a verbal explanation of any information that accompanied it. [178]

Q. Is your statement a complete recollection of everything you now know about the documents exhibit 49 and 49-A? A. That's right.

Q. Have you seen, or do you know of your own personal knowledge, whether or not there is any additional correspondence with Mr. Hillman or Mr. Hillman's firm, relating to the Drive-In unit, manufactured by Waldrip Manufacturing Company or devised by Mr. Moon?

A. To my knowledge that is all that was ever referred to me. [179]

* * * * *

Plaintiffs' Exhibit No. 98—(Continued)
(Deposition of Wayland B. Woody.)

Q. That work by Mr. Aulur, and such work as you did with Mr. Aulur, was done in California, was it not?

A. It was done in California. I had no direct contact with it. The only time that I had any knowledge of what was going on, there were two or three prints sent in here, on which I made comments to Mr. Carl White.

Q. Mr. Woody, I show you a folder, marked Waldrip Western——

Mr. Subkow: May it be stipulated, Mr. Crowley, that this is the exhibit 8, that is in the Moon deposition?

Mr. Crowley: Yes.

Mr. Subkow: And may we introduce it in this deposition by reference to the Moon deposition?

Mr. Crowley: You may.

Q. Have you ever seen this exhibit 8 before, Mr. Woody? A. Yes, sir, I have.

Q. Will you tell us the history of that, as to your knowledge of it?

A. This was evidently given to someone in the organization, and was eventually sent up, as I recall, from Mr. White's office for my file. I keep a competitive file. From time to time announcements, or sometimes advertisements, catalogs of [180] competitive equipment are kept in that file, as a matter of reference, if any question comes up as to what one person is doing, or one competitor is doing compared to what we are doing.

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

Q. Do you know who the person was in your organization, first obtained this document?

A. No, I don't. The first knowledge that I had of it was when Mr. White brought it up and gave it to me.

Q. Can you fix the date when it was given to you?

A. Well, as I recall, this didn't come into my possession until near the end of production of this kind of equipment by Waldrip Western, it may have even been after, because at the time the equipment was being built, as I recall, I had no concrete information on it at all,—at least most of the time it was under construction, I had no concrete information on it at all.

Q. Did you have it before Mr. Aulur started his work?

A. That is doubtful. He may have, but as far as him having it,—having at least this copy, unless there was other material in California,—as far as him having this copy as a matter of reference, he didn't.

Q. With respect to your obtaining it from Mr. White, can you fix it as to whether or not you obtained it before or after you engaged Mr. Aulur to do the designs, to which you referred? [181]

A. To the best of my recollection it was after. Mr. Aulur was detached from regular engineering, oh for probably a year or more before he was sent to California, and during the time he was detached,

Plaintiffs' Exhibit No. 98—(Continued)

(Deposition of Wayland B. Woody.)

both here and in California, he had no access to our file—oh, he had access, but just on specific service problems. He was service engineer before he went to California and that was largely what he was supposed to engage in out there. The work he did on this was a side issue.

Q. Miss Gordon, would you read my question to Mr. Woody?

(The last question was read by the reporter.)

A. I can't state positively the date.

Q. What is your best recollection?

A. The best recollection is that that material came into my hands after the——

Mr. Crowley: Demise?

A. ——practically so. At any rate it didn't do me any good as far as having information on current products.

Q. Mr. Woody, the question was whether or not, what your best recollection is as to when you received it. If you have no recollection whatever, why that is all right. [182]

* * * * *

A. If I may, I might amplify the statement. As I recall, production of the equipment illustrated in there, had been probably in the process for three years at the time that book came into my possession. I would say it was possibly 1950, it might have been '49. [183]

* * * * *

[Endorsed]: Filed July 23, 1957.

[Endorsed]: No. 16132. United States Court of Appeals for the Ninth Circuit. James Moon, Edmond M. Wagner and Philip Subkow, Appellants, vs. Cabot Shops, Inc., and Howard Supply Company, Appellees. Cabot Shops, Inc., and Howard Supply Company, Appellants, vs. James Moon, Edmond M. Wagner and Philip Subkow, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: August 6, 1958.

Docketed: August 9, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16132

JAMES MOON, EDMOND M. WAGNER, and
PHILIP SUBKOW, Appellants,

vs.

CABOT SHOPS, INC. et al., Appellees.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD ON BEHALF
OF DEFENDANTS, CABOT SHOPS, INC.
AND HOWARD SUPPLY CO., APPEL-
LEES-CROSS-APPELLANTS

Appellees-cross-appellants hereby adopt as their statement of points on appeal and their designation of record the statement of points relied upon by defendants-appellants appearing at page 117 et seq. of the typed record and the designation of record on appeal by defendants-cross-appellants appearing at page 115 et seq. of the typed record.

Dated this 8th day of August, 1958.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Appellees-
Cross-Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 9, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD ON BEHALF
OF APPELLANTS - CROSS - APPELLEES,
JAMES MOON, EDMOND M. WAGNER
AND PHILIP SUBKOW

Appellants-cross-appellees hereby adopt as their statement of points on appeal and their designation of the record, the statement of points relied upon by plaintiffs-appellants appearing at page 112 et seq. of the typed record and the designation of the record on appeal by plaintiffs-appellants appearing at page 102 et seq. of the typed record.

Dated this 5th day of September, 1958.

/s/ PHILIP SUBKOW,

In Propria Persona and Attorney for Appellants-
Cross-Appellees.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 10, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Stipulated by and between the parties that each of the following exhibits in evidence in this cause be included within the printed record, to wit:

Exhibits 1, 1A, 10, 11, 12, 19, 33, 34, 35, 44, 45, 59, 84, AB, 91, 97, those portions of the Woody Deposition Exhibit 98 specified in Plaintiffs' Designation Item 25, Exhibit 101 (Plaintiffs' Designation Item 11), Exhibit 102 (Plaintiffs' Designation Item 6), Exhibit 103 (Plaintiffs' Designation Item 10), Exhibit 104 (Plaintiffs' Designation Item 9), Exhibit 105 (Plaintiffs' Designation Item 8) and each patent in Exhibits S and T-1, other than the patent Exhibits 10, 11, 19, 44, 45. All other of the exhibits and portions of exhibits designated by plaintiffs-appellants or defendants-appellees shall be included in the record as physical exhibits in their original form without reproduction in the printed record.

Dated this 5th day of September, 1958.

LYON & LYON,

/s/ By CHARLES G. LYON,

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[Endorsed]: Filed September 10, 1958. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

No. 16132.

JAMES MOON ET AL.,
PLAINTIFFS, APPELLANTS,

v.

CABOT SHOPS, INC., ET AL.,
DEFENDANTS, CROSS-APPELLANTS.

BRIEF FOR CROSS-APPELLANTS.

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Statement of Jurisdiction.

This case arises on appeal from the judgment of the United States District Court, Southern District of California, Central Division. In that Court plaintiffs James Moon, Edmond M. Wagner and Philip Subkow brought an action against defendants Cabot Shops, Inc., and Howard Supply Company for infringement of United States Letters Patent No. 2,671,537. Jurisdiction of the District Court arose under 28 U.S.C. § 1338(a); jurisdiction of this Court arises under 28 U.S.C. § 1292(4). There is no dispute as to jurisdiction.

Statement of the Case.

After full trial the District Court entered judgment for defendants (R. p. 90). In that judgment the Court ruled

that the claims of the patent in suit were valid but that none of the claims in suit had been infringed by defendants.

Plaintiffs below have appealed from the judgment (R. p. 92), and defendants below have cross-appealed from that portion of the judgment which ruled that the claims of the patent in suit were valid (R. p. 93).

This cross-appeal, therefore, challenges the judgment of validity and raises questions as to whether or not the District Court correctly analyzed and applied evidence offered on behalf of defendants for the purpose of proving that the claims were invalid.

Specification of Errors.

1. The District Court erred in failing to rule that the claims of the patent in suit are invalid as being for nothing more than a collection of elements old in the art combined in an obvious manner to produce an obvious result.

2. The District Court erred in failing to rule that the alleged invention of the patent in suit was described in printed publications published more than one year prior to the filing of the application for the patent in suit.

3. The District Court erred in failing to rule that the claims of the patent in suit are invalid for lack of invention over prior art devices.

The Patent in Suit.

The patent in suit, No. 2,671,537 (R. p. 638), was issued to the plaintiff Moon on March 9, 1954, on an application filed in the Patent Office June 28, 1948. It relates to portable drilling and servicing rigs primarily useful for drilling oil wells and for pulling and inserting oil-well tubing.

In earlier times a derrick was constructed at the location of a well, used in connection with drilling operations, and

left permanently in position so that it might be used later on, from time to time, in connection with servicing operations, *i. e.*, pulling and inserting tubing, bailing, etc. These derricks were expensive eyesores. Hence there were developed a number of types of portable derrick units which could be collapsed into horizontal position and carried from one location to another. Examples of such units, or rigs, appear in such prior art patents as:

McEwen,	No. 2,331,558 (R. p. 898 <i>et seq.</i>).
Cardwell,	No. 2,276,224 (R. p. 860 <i>et seq.</i>).
Franks,	No. 2,215,920 (R. p. 854 <i>et seq.</i>).
White,	No. 2,204,713 (R. p. 658 <i>et seq.</i>).

By way of example, the McEwen patent shows a derrick 10 having telescoping sections and a hydraulic jack 22 for rotating the derrick from horizontal to vertical position about a hinge point 9 mounted at the rear end of a chassis 2 drawn by a truck or tractor 1 containing an engine and a space for a driver. The derrick was driven over the road while in horizontal collapsed condition (Fig. 1) and erected for operation (Fig. 3) at the site of a well. The White patent shows a similar rig in which, however, the derrick is erected by a screw 9 operating a cross-head 7 and pitman 4.

The patent in suit (R. p. 638) shows a similar rig with the same elements somewhat reversed. As shown in Fig. 1, there is a telescoping derrick 19 and a hydraulic jack or jacks 28 for rotating the derrick from horizontal to vertical position. However, the derrick rotates about a hinge point 17 adjacent the front of the cab, above the driver, the bottom of the derrick being disposed at the front of the chassis. Moreover, the engine 4 is disposed at the rear of the chassis.

Moon originally sought a patent covering this simple rearrangement of the old elements. Cancelled claim 6 is an example of what he considered his invention to be; it reads as follows (from R. p. 502) (Appendix, p. 35):

“6. A portable drilling derrick, comprising a vehicle chassis, front and rear wheels for said chassis, the ends of the legs of said derrick protruding ahead of said front wheels and the top end of said derrick being positioned toward the rear of said chassis, a hinge on said derrick, said hinge being mounted at the front end of said chassis, and means positioned on said chassis to rotate said derrick about said hinge point to move said derrick to an erect position.”

The Patent Office rejected all such claims, primarily because they expressed nothing more than a simple reversal of the parts shown in such patents as McEwen. Moon fought hard; he filed lengthy arguments and affidavits, and his attorney interviewed the Examiner, getting nowhere (Appendix, pp. 51-55).

Finally, the Examiner was persuaded to allow claims limited to a construction in which the legs of the derrick straddle the driver's position, as best shown in Fig. 3 of the patent in suit. Here it appears that the rear legs 18 of the derrick pass downwardly in a plane which includes part of the steering wheel and the driver's seat. The file wrapper does not reveal why that feature impressed the Examiner, since the discussion of it was at an oral interview. All we have for guide is Mr. Subkow's statement appearing at page 48 of the file wrapper (also R. p. 503) (Appendix, p. 51):

“One of the features which the Examiner indicated as possibly carrying the claim over the then cited ref-

erences was the straddling of the cab by the derrick when erected.”

In defendants’ rigs the legs do not straddle the driver’s position; the hinge is mounted at the upper front extremity of the truck or cab (*cf.* Ex. 59, R. p. 773, and the photographs, Ex. AB, R. p. 990, AF, AG).

Plaintiffs are in a hopeless dilemma. If the claims of the patent in suit are narrowly interpreted, they are not infringed, as the District Court held. If they are interpreted broadly enough to cover defendants’ structures, then they are invalid as calling for a simple and obvious reversal of the parts of the old McEwen and White devices.

We now have established that Moon admitted that his invention was not in simply reversing the derrick and engines; he admitted that when he cancelled all the broad claims and accepted claims strictly limited to a rig in which the legs of the derrick straddled the driver’s position. Therefore we turn to a consideration of whether the addition of that feature was patentable.

Making the Legs Straddle the Driver’s Position was Not Invention.

The Patent Office ruled that mounting the derrick for rotation at the front of the chassis was not inventive. That seems only common sense. But the Patent Office ruled that *it was* invention to have the legs of a front-mounted derrick straddle the cab or driver’s position. Why? We shall never know the answer, since the file wrapper does not tell us. Plaintiff offered no evidence to explain it. When Moon himself designed and built rigs, the legs did not straddle the cab (see Ex. 33, R. p. 682; Ex. 34, R. p. 683; Ex. 35, R. p. 684; Ex. G). Mr. Moon testified at his deposition:

“Q. Did you ever build a rig with the hinge point directly over the steering wheel?

“A. No.

“Q. Why not?

“A. First we didn't consider it desirable from a safety standpoint; we felt the cab would be too vulnerable to damage when it was located closer to the well-head than if we would put the hinge point directly forward of the cab. Second, in the design that we worked out, because of the wheel loadings we were trying to achieve we found it more desirable to move the derrick slightly forward.”

Our position on this point may be summed up as follows:

1. Moon's patent was issued only after the claims were limited to a rig in which the derrick legs straddle the cab.
2. Neither Moon nor defendant built a rig in which the legs straddled the cab.
3. There is no evidence to show that straddling the cab was useful, desirable or advantageous.
4. Hence the claims do not define invention.

In support of our position we rely upon *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, and *Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 122 F. 2d 492 (C.A. 9).

The Claims are Invalid by Reason of the Waldrip Advertisements.

Moon was vice-president of Waldrip Engineering Company (R. p. 216), which manufactured units of the type here in question. In the spring of 1947 that company placed advertisements in trade journals, some of which are in evidence as follows:

R. p. 370, Ex. M

Oil Weekly, May 5, 1947, p. 58 (Appendix, p. 26).

R. p. 371, Ex. N

The Oil and Gas Journal, May 10, 1947, p. 104 (Appendix, p. 27).

R. p. 371, Ex. O

The Petroleum Engineer, June 1947, p. 192 (Appendix, p. 29).

R. p. 372, Ex. P

The Petroleum Engineer, May 1947, p. 234 (Appendix, p. 31).

R. pp. 372, 385, Ex. Q

The Petroleum Engineer, Apr. 1947, cover.

These publications were in fact published more than one year before the filing of the application for the patent in suit, *i. e.*, June 28, 1948.

35 U.S.C. § 102, reads in part as follows:

“A person shall be entitled to a patent unless—

“(a) . . .

“(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, . . .”

If the advertisements disclose the structure of the patent in suit, the patent is clearly invalid. There is no dispute as to the fact or dates of the publications. The controversy here is whether or not the disclosures of the publications

are essentially of the same structure as that of the patent. The District Court held (R. p. 89):

“5. It does not clearly appear from the evidence that the devices described in the printed publications embody the invention of the patent in suit, the details not being apparent from the advertisements.”

Most unfortunately the District Court did not specify *what* “details” were not apparent. We contend that every material element is clearly shown or described.

Let us take, for example, claim 1 of the patent in suit and compare it with Ex. P (Appendix, p. 31):

Claim 1

Ex. P

“A portable derrick” comprising a chassis

Obvious from picture and text; any vehicle has a chassis

front wheels mounted on axle positioned adjacent the rear end of the chassis

obvious from drawing

a driver's position with steering and motive power controls positioned adjacent the front end of said chassis and extending forward of the front axle

see cab and steering wheel, upper picture and position of front axle relative thereto

a collapsible and extensible derrick

“Waldrip telescoping derrick” (in text of advertisement)

pivotally mounted on the chassis to move from a rest position on said chassis

see upper picture for “rest position”

with the top end of the derrick positioned rearwardly of said chassis and the bottom of said derrick being positioned on said chassis toward the front end of said chassis

comparison of upper and lower pictures shows top end of derrick is at rear when lowered; lower end of derrick is at front of chassis

*Claim 1**Ex. P*

spaced two front and two rear legs for the derrick

cross bracing between said legs with a free area between a portion of the legs

said derrick comprising a lower section and an upper section, means for moving the upper section relative to the lower section to extend and to collapse said derrick

a hinge on said derrick positioned near the bottom end of said derrick
said hinge also positioned on said chassis intermediate the forwardmost limits of said chassis and the front axle and above said driver's position

and means for rotating said derrick about said hinge to an erect position adjacent the front end of said chassis

said means including a rotation power transmitting member connected to said derrick at a point on said derrick spaced from said hinge, said transmitting member transmitting rotated power to said derrick to rotate said derrick about said hinge

obvious; *cf.* Groner test. (R. p. 406: "Q. Have you ever seen a two-legged derrick? A. No, sir. I have not.")

obvious and necessary

There must be such a free area; otherwise how could derrick move from position in upper picture to straddle the cab as shown in the lower picture?

"Waldrip telescoping derrick"; also clear from pictures

If you compare upper and lower pictures, it is evident that derrick has been pivoted about a point over the steering wheel just as called for by claim

A comparison of the two pictures shows a hydraulic jack, which in the upper picture is shown in collapsed position back of the cab, and in the lower picture is shown extended

It is obvious from the pictures that the jack is connected to the derrick back of the hinge

*Claim 1**Ex. P*

and a load transmitting connection between said member and said chassis

The lower end of the jack must of necessity be connected directly or indirectly to the chassis at its lower end

said connection being positioned on said chassis between said front and rear axles

Here again it is obvious that the lower end of the jack is mounted between the axles

lower portions of said legs being spaced apart transversely with respect to said chassis a distance greater than the transverse extent of said driver's position

A glance at the lower picture shows definitely that the legs of the derrick clear the cab

and said lower leg portions and said hinge being located with respect to the longitudinal axis of said chassis to cause a portion of the driver's position to enter said free area and the lower rear leg portions to straddle said driver's position when the derrick is in said erect position

Here again the specific relationship is clearly shown in the lower picture

We reproduce on an adjoining page (at the top) Fig. 1 of the patent in suit. Beneath it we show the picture from Exhibit O. We make three specific contentions:

1. Even the casual observer will recognize that the picture in Exhibit O represents the same apparatus shown in Fig. 1 of the patent.

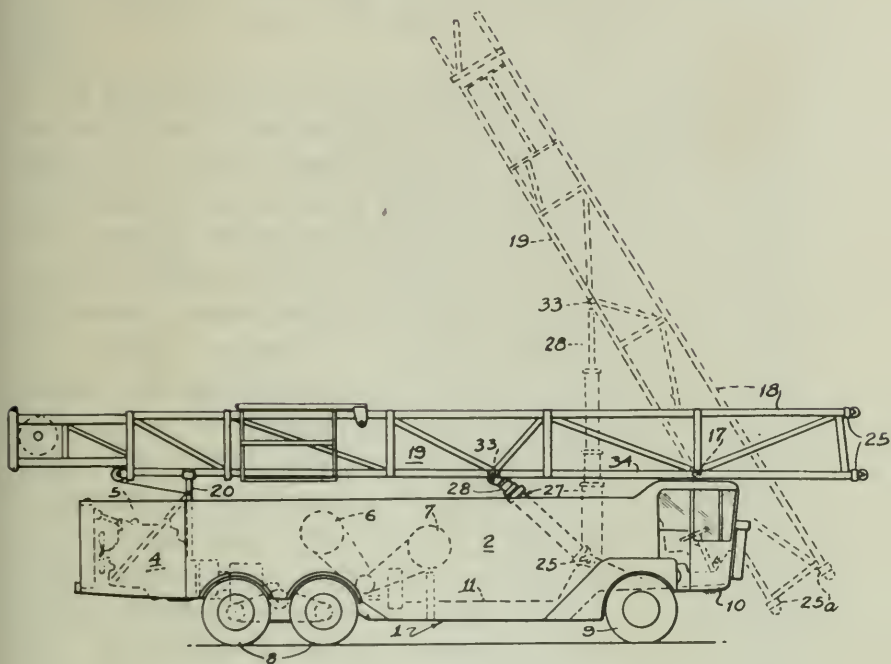
2. A competent engineer would recognize that the showing of Exhibit O is the same device shown in Fig. 1 of the patent, even though the engineer has had no specific experience in the field.

3. An engineer having experience in the specific field would recognize that Exhibit O shows precisely the equipment disclosed in the patent.

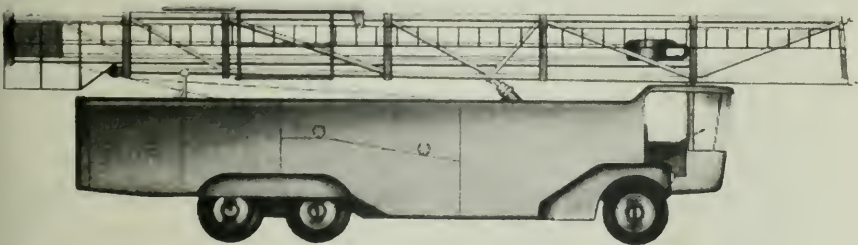
With respect to the first contention we say simply that, if you read the advertisement and look at its pictures, you

FIG. 1 OF THE PATENT IN SUIT

FROM EXHIBIT I



PICTURE FROM EXHIBIT ()



FROM EXHIBIT O

have the clear and distinct impression that they show and describe exactly what is found in the patent in suit. That is, of course, a subjective proposition, and we can only trust that the Court will gain the same impression we have.

We have proved the truth of the second contention. In the course of preparing for trial we recognize that, if an expert in the field studied the patent and studied the advertisements, he would be subject to attack on the ground that, when he interpreted the exhibits, he would be unconsciously influenced by his study of the patent. Therefore defendants' counsel called Mr. Stanley Groner, a mechanical engineer engaged in design work on aircraft fuel pumps. He had never seen the patent in suit, nor had he seen any of the equipment used to drill and service oil wells. He testified solely on the basis of his examination of Exhibits M, N, O, and Q (R. pp. 387 *et seq.*). His testimony proves that a competent engineer will derive from these exhibits information which is substantially the same that he would derive from an examination of the patent in suit. Mr. Groner is the only witness in any way connected with this case who could interpret Exhibits M-Q without any shadow of bias or prior knowledge which would influence him one way or the other.

Mr. Frank Purdum, a consulting petroleum engineer, had had many years of experience with all kinds of oil-field equipment. He testified that the disclosure of Exhibits M-Q corresponded exactly with the disclosure of the patent (R. pp. 375 *et seq.*).

Mr. Groner and Mr. Purdum testified that the structure of the patent in suit had been disclosed by Exhibits M-Q. Plaintiffs did not offer a word of testimony to dispute the testimony of Messrs. Groner and Purdum. It is perfectly obvious that, if the ordinary worker in this art would *not* find in Exhibits M-Q what he finds in the patent in suit,

there would have been witnesses produced by the plaintiffs in support of such a proposition. The absence of any such witness is extremely significant.

The Requirements of the Statute Regarding Prior Publications.

35 U.S.C. § 102(b) is in part as follows:

“A person shall be entitled to a patent unless—

.

“(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of the application for patent in the United States, . . .”

The first paragraph of section 112 of Title 35 reads as follows:

“The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.”

Plaintiffs contended in the Court below that a publication such as any one of Exhibits M-Q does not invalidate a patent unless *every* detail of the disclosure of the patent is to be found in the publication. We do not accept that

contention. It seems obvious to us that the proper test should be whether or not the publication is sufficient to carry the essential message to the art as to the nature of the alleged invention. The testimony of Messrs. Groner and Purdum certainly shows that the publications met that test.

It is also to be noted that, when it comes to the sufficiency of the patent application, the gist of the requirement of section 112 is that the disclosure be such "as to enable any person skilled in the art . . . to make and use the same." A review of the testimony of Groner and Purdum certainly reveals that the publications did in fact contain sufficient material to enable a man skilled in the art to make and use the invention.

As was stated by the Court in *Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 122 F. 2d 492, 497 (C.A. 9):

"The publication does not show exact detailed construction, nor attempt to specify the strength of the various parts; neither do any of the patents in suit. . . . The same rules as to the sufficiency of the description in a patent apply to the printed publication. 48 C.J. § 52, pp. 49, 50, 51."

Note here that Exhibit M (Appendix, p. 26) tells us that the Waldrip unit "has a net hook horsepower of 117 and will start 4000 feet of 2½ inch tubing off bottom at 90 feet per minute with three lines strung on the block"; also: "This light-weight unit complies with California highway regulations when equipped with Waldrip-Western 65 foot 60,000 pound or 90,000 pound hook load capacity telescoping derrick." None of that information appears in the patent, and it can truly be said that the published advertisements give a more specific description than does the patent.

Since the District Judge did not specify which "details" of the invention were not "apparent from the advertisements," we obviously cannot comment to any great extent. It would be idle to speculate as to which detail or details were not apparent to the District Judge. We can only say that in our best judgment there is no detail of any significance which is not found in the advertisements.

The Filing Date of the Patent Application Cannot be Carried Back.

In his findings of fact, conclusions of law and judgment, page 89, the District Judge held:

"7. The application of the patent in suit does not contain any caveat on the face of the issued Letters Patent giving notice of any claim to any filing date earlier than the filing date of the patent in suit."

On page 90 of the record he further ruled:

"3. Plaintiffs are not entitled to carry the effective filing date of the patent in suit to February 24, 1948, the filing date of the application Exhibit 46."

Plaintiffs urge that Exhibits M-Q were not publications published more than a year before the filing date of the application for the patent in suit by reason of the fact, they claimed, that the invention was disclosed in a prior application of Moon and that Moon was entitled to the benefit of the earlier filing date. That subject involves section 120 of Title 35:

"§ 120. Benefit of earlier filing date in the United States.

“An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and *if it contains or is amended to contain a specific reference to the earlier filed application.*” (Emphasis ours.)

The fact is that the application for the patent in suit contained no reference to any earlier application of Moon; furthermore, the application was never amended to contain any reference to any earlier application of Moon. The District Court held, in effect, that a patentee is not entitled to the benefit of any earlier filed application unless the specific language of section 120 has been complied with. That proposition seems so logical and unassailable that we feel no further comment is needed.

The Patent in Suit is Invalid as Lacking Invention over the Prior Art.

On this phase of the case we contend that the patent in suit is invalid for the reason that it discloses nothing rising to the dignity of an invention, in view of three prior art patents. We refer first to the patent to Morton, No. 966,346, comparing it to Exhibit S and beginning at page 781 of the record. The Morton patent, like the patent in suit, deals with the problem of a telescoping tower which

can be carried on a vehicle in flat horizontal position and then erected into vertical position at a desired site. Mr. Morton was not dealing with oil-well equipment; he was dealing specifically with a fire-fighting tower. It is perhaps most instructive to start with Fig. 10, in which the telescoping tower is shown in one of its possible positions of operation. Here we find a telescoping tower of three sections, 43, 44 and 45. It is mounted on a chassis *a* including front wheels and rear wheels, and there is provided a pneumatically operated jack or lever 50 by means of which the tower can be raised from a flat collapsed position on the chassis to the elevated position shown in Fig. 10. If now we look at Fig. 2 (R. p. 781), we see that the tower section 43 is flat on the chassis *a*, the tip ends of the other two sections 44 and 45 appearing at the right-hand end of the drawing. There is also a pneumatic cylinder 195 in which there is a piston which operates the elevating lever 50. When Figs. 2 and 10 are compared, it is quite evident that the elevating mechanism is of the same genus as the jack 28 in the patent in suit. It will also be noted that there is a driver's seat 400 adjacent to the bottom of the tower, and shafts are shown in part connected to the axle at the front wheel *b*.

The Morton patent was applied for in 1904, at a time when vehicles were drawn by horses rather than engines. Obviously it would not amount to invention in 1948 to substitute an engine for a horse. As a matter of fact, referring to Fig. 2 of the Morton patent there appears an engine 198 mounted *at the rear* of the chassis *a*. The engine 198 was provided, not for the purpose of propelling the vehicle but rather for driving the pump 196 which serves the hydraulic cylinder 195 used to actuate the elevating mechanism, but it certainly shows that it was old and well understood that an engine might be mounted at the rear of a vehicle.

It should be noted that the Morton apparatus has a hinge at the front about which the tower is rotated. The thrust on the lever 50 is transmitted to the chassis between the front and rear wheels. In short, all that would be necessary by way of modification of the Morton device to produce the device of the patent in suit would be to install the propelling engine at the rear and replace the tubular tower by the conventional telescoping derrick.

It may be objected on behalf of plaintiffs that the art of fire towers is not analogous to the art of portable oil-well derricks. Our answer to that is that the Patent Office cited fire-fighting apparatus against the Moon application, as shown by the Steck patent in Exhibit T-1 (R. p. 953). Moreover, Moon testified that he had himself designed fire-fighting equipment (R. p. 317). The significance of the Morton patent is that it demonstrates very clearly that a competent engineer faced with the problem of transporting a telescoping tower or derrick would solve that problem in the same basic way that appealed to Mr. Moon.

We turn now to a consideration of the Evans patent, beginning at page 880 of the record and forming part of Exhibit S. Of particular significance are Figs. 10 and 11. Here there is shown a chassis having front wheels 11 and rear wheels 12. The chassis has an engine 5 disposed over the rear wheels, just as in the Moon patent. Moreover, at the front of the device there is mounted a folding derrick 110, the upper half of which may be rotated rearwardly and downwardly until it lies flat, as shown at Fig. 10, in which position it is supported at its rear by a brace 120. Again, we do not assert that the Evans patent shows a device which, as it stands, could be usefully employed to service oil wells. It would have to be larger in every dimension. We do assert, however, that the Evans patent, like the Morton patent, shows the basic combination of a chassis, an engine, and a collapsible tower or derrick struc-

ture mounted at the front end of the chassis and adapted to be rotated into horizontal position for transport and also arranged to be rotated to vertical position at a desired location. Here again, a competent engineer adopted the same basic solution to the problem which Mr. Moon found attractive.

Finally we turn to the Downie patent, appearing at page 803 of the record. The apparatus shown in the Downie patent is, rather surprisingly, still in use in the oil fields, as Mr. Purdum testified (R. p. 413):

“The one thing of interest regarding this machine is that the same general type is still in use in drilling shallow wells and drilling wells in after rotary in several parts of the country. I saw one just the other day in operation.”

Here again we have a chassis with front wheels 3 and rear wheels 4, as clearly shown in Fig. 1. There is an engine mounted at the rear of the chassis and a tower mounted at the front of the chassis. It should be noted that the derrick or mast 13 is hinged at 12 to the posts 9, which are supported and braced adjacent the front end of the chassis, and the patent states (p. 2, line 42):

“The posts 9 have secured thereto by hinges 12 one end of a derrick or mast 13, such as is commonly employed in connection with well drilling machines, the hinges 12 permitting the folding of the mast down upon the vehicle so as to lie comparatively flat when the machine is being transported from place to place and the derrick is provided with braces 14 which may be connected by bolts 15 to brackets 16 upstanding from the posts 8.”

The Downie patent was applied for back in January, 1912, and, as might be expected, the device does not include a propelling engine. But with the knowledge of automotive equipment held by a competent engineer, in the period following the second World War, it certainly cannot amount to inventive genius to take from the Downie patent the concept of a collapsible derrick mounted at the front end, an engine mounted at the rear, and add to that the common propelling engine and cab found in the truck.

Some Applicable Cases.

In *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 87 U.S.P.Q. 303; 340 U.S. 147, the Supreme Court held invalid the Turnham patent in spite of concurrent findings of the lower Court that the alleged invention had filled a long-felt want, as evidenced by its immediate acceptance in the industry, stating:

“The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts in the accumulation of old devices patentable. Elements may, of course, especially in chemistry or electronics, take on some new quality or function from being brought into concert, but this is not a usual result of uniting elements old in mechanics. This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned, and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test.”

In *Jungersen v. Ostby & Barton Co.*, 80 U.S.P.Q. 32; 335 U.S. 560, the Supreme Court held invalid the Jungersen

patent covering a lost wax process of casting precious metals. This patent had proved extremely important in the industry. Numerous licenses had been issued and the opinion of the Court below clearly shows that the patent had had massive impact upon the art; but the Court stated:

“Where centrifugal force was common as a means of introducing molten metal into the secondary mould, its use in an intermediate step to force molten wax into the primary mould was not an exemplification of inventive genius such as is necessary to render the patent valid. . . . Thus Jungersen employed in his claimed invention well-known skills and practices in a manner and for a purpose long familiar in the field of casting. His claimed improvement is therefore not patentable.”

In *Altoona Publix Theatres, Inc., v. American Tri-Ergon Corp.*, 24 U.S.P.Q. 308; 294 U.S. 477, the Supreme Court was considering an improvement relating to the reeling of sound track upon films, where the inventor had added a fly wheel to obtain uniform speed. The improved machine was novel and solved a long-recognized problem, but the Court held that, where the operating principle of a main patent is retained, and the so-called improvements fall within the reach of ordinary mechanical skill, there is no patentable invention.¹

¹ It is interesting to note that the Courts of other countries must wrestle with the same problems facing us here. Thus in Canada, MacLean, J., speaking for the Court in *Canadian Gypsum Co. Ltd. v. Gypsum, Lime & Alabastine Canada, Ltd.*, Ex. C.R. 187 (1931), stated:

“To support a valid patent there must be something more than a new and useful manufacture, it must have involved somehow the application of the inventive mind; the invention must have required for its evolution some amount of in-

Judge Hutcheson (C.A. 5) has written (14 Cornell Law Quarterly, pp. 274-288):

“Judges who have tried many patent cases, who have heard the testimony of experts, the one affirming the matter to be merely an advance in mechanical steps, the other to be invention of the highest order; the one affirming prior use, the other denying it; the one affirming it to be the flight of genius into new fields, the other, the mere dull trudging of an artizan, know that for a just decision of such causes no objective criteria can be relied on. They know well that there must be in the trier something of the same imaginative response to an idea, something of that same flash of genius that there is in the inventor, which all great patent judges have had, that intuitive brilliance of the imagination, that luminous quality of the mind, that can give back, where there is invention, an answering flash for flash.”

When the Moon patent here in suit is viewed in the light of the prior art, we contend that there is nothing disclosed in the patent which has the ring of invention about it. Surely to hinge a derrick for rotation at one end of a vehicle instead of the other is not an impressive step. Whether or not the derrick is arranged to clear the vehicle

genuity to constitute subject matter, or in other words invention. Fortunately the law does not authorize the granting of a monopoly for everything that is new and useful. The design of the patent law is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. If there is no novelty, there can of course be no inventive ingenuity, but if there is novelty in the sense required in the law of patents, it must be the product of original thought or inventive skill.”

or straddle a portion of it is an even more inconsequential point. We respectfully submit that the Moon patent contains no scintilla of inventive genius.

The Problem of Highway Legality.

There was a mass of testimony at the trial offered by plaintiffs in an attempt to persuade the Court that Moon's alleged invention had solved the problem of making portable well-servicing rigs which would comply with the highway laws of the various states. These laws limit the weight per axle and limit the forward, rear and lateral dimensions of all vehicles using the highways. The patent itself says nothing whatsoever about the highway laws, nor was it written as one would write a patent application if the object of an invention had been to produce equipment which complied with the highway laws.

In any event, it is quite evident that Mr. Moon did not solve the problem posed by the highway laws. We refer in particular to the testimony of Mr. Hopper (R. pp. 331-332):

“Q. I would like to ask you about the problem of legality of the well servicing and drilling rigs, and ask whether in the light of your experience you have greater problems with drive-in equipment or with back-in equipment.

“A. No, I would say in general the problems are very similar.

“Q. Would you say that the problem of legality of this type of equipment is one which has been satisfactorily solved?

“A. No, that problem will be with us forever, as near as I can tell.”

Mr. Hopper is the Manager of shop operations for the Hopper Machineworks, Inc., present in Court under subpoena and having no connection with this suit, except for the fact that his company had taken a license under the Moon patent. Mr. Hopper is a man of vast experience in the field.

Conclusion.

We have demonstrated, we trust, that the patent in suit is invalid for any one of three distinct reasons. We realize, however, that it is incumbent upon us to show that the District Court was clearly erroneous. Ordinarily we should take considerable pains to deal with the reasoning of the lower Court's opinion in an effort to show where the error or errors occurred. However, an examination of the findings of fact and conclusions of law shows very clearly that the District Court did not anywhere set forth its reasoning. We must therefore rest our case on the proposition that, when our three contentions are carefully examined, it is obvious that they are all completely logical and conclusive, the result being that a contrary ruling would be clearly erroneous.

To sum up, we say that our first proposition is that the patent in suit does not disclose anything but an obvious reversal of the parts of the prior art as evidenced by the McEwen patent (R. p. 898).

Our second proposition is that the patent in suit is obviously invalid by virtue of the fact that the alleged invention of the patent in suit had been shown and described in printed publications published more than a year prior to the filing date of the application in suit. We refer here to Exhibits M-Q (Appendix, pp. 26-31).

Our final position is that the patent in suit is clearly invalid, since it does not disclose anything which could be considered as a display of inventive genius over the old prior art devices disclosed in the Morton patent (R. p. 781), the Evans patent (R. p. 880) or the Downie patent (R. p. 803).

We therefore respectfully represent that that part of the judgment holding the patent valid should be reversed, with costs to cross-appellants.

LYON & LYON,

CHARLES G. LYON,

711 West Seventh St.,

Los Angeles, California.

KENWAY. JENNEY. WITTER & HILDRETH,

HERBERT P. KENWAY,

GEORGE W. CROWLEY,

24 School Street,

Boston, Massachusetts.

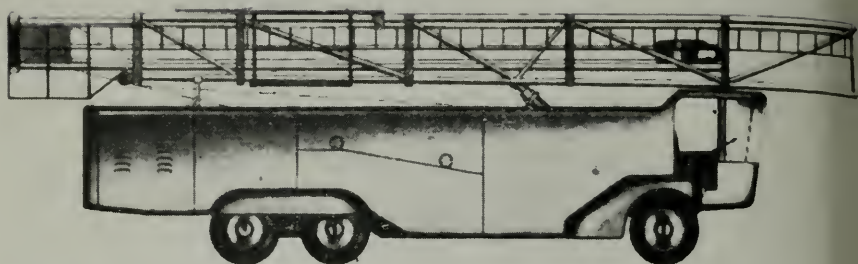
KENNETH W. BROWN,

77 Franklin Street,

Boston, Massachusetts.

APPENDIX.

From Oil Weekly, May 5, 1947



5—Portable Servicing Rig

Model 321, self-propelled servicing and drilling rig, is designed to service wells to 4000 feet and to clean out, deepen and workover wells to 2500 feet. It has a net hook horsepower of 117 and will start 4000 feet of 2½-inch tubing off bottom at 90 feet per minute with three lines strung on the block.

The unit is comprised of a double drum hoist with single engine drive, torque converter or gear transmission, right-angle gear box and portable telescoping derrick of unusual design, all integrally mounted on a streamlined six-wheel chassis. Rotary countershaft with propeller shaft rotary drive and regular and automatic catheads are offered as accessory equipment. Speed of moving and erection has been a prime consideration in the design. The portable rig may be driven into the location nose

first instead of backing in. This provides easier, faster spotting at the well location.

Functional design provides balance with less weight, it is claimed. There is less load over the front wheels. Power controls are placed at the derrick level to allow the best possible operating vision. The motor, located at the rear of the unit, is easily accessible and completely enclosed by streamlined contour guards. It is available with gas, gasoline, butane or diesel engine and with a torque converter or gear box at the operator's option. This light weight unit complies with California highway regulations when equipped with Waldrip-Wester 65-foot, 60,000-pound or 90,000-pound hook load capacity telescoping derrick.

Waldrip Engineering Company, Los Angeles.

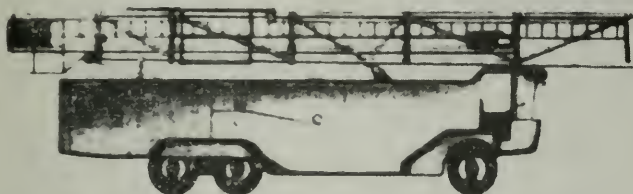
Check item 5 on postcard for more information

From Oil and Gas Journal, May 10, 1947

Ex N
~~EXHIBIT N~~
OIL AND GAS EQUIPMENT

58
Waldrip
CHECK IT

(4) PORTABLE SERVICING AND DRILLING RIG provides easier, faster spotting by driving into well location nose first instead of backing in. New self-propelled rig services wells to 4,000 ft. and works over wells to 2,500 ft. It has a net hook horsepower of 117 and will start 4,000 ft. of 2½-in. tubing off bottom at 90 ft. per minute with three lines up. Unit is comprised of a double-drum hoist



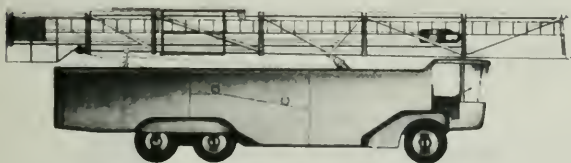
with single-engine drive, torque converter or gear transmission, right-angle gear box, and portable telescoping derrick, all mounted on a streamlined six-wheel chassis. Functional design provides better balance and less weight, increasing speed of moving and erection. Power controls are placed at derrick leg for best operating vision. Motor at rear of unit is easily accessible, completely guarded by streamlined contour guards. Waldrip Engineering Co.

Nose first

EXHIBIT 0



• THE WALDRIP "321" ASSURES FASTER SPOTTING AT WELL LOCATION because it is the ONLY self-propelled servicing and drilling rig that drives into the well location NOSE FIRST.



CHECK THESE OUTSTANDING FEATURES—Better balance with less weight
 • Less load over front wheels • Clear operating vision • Easily accessible motor in rear • Unit completely guarded by smooth, streamlined contour, guards
 • Furnished with gas, gasoline, butane or Diesel engine • Furnished with torque converter or gear box • Equipped with 65', 60,000 pound or 90,000 pound hook load capacity Waldrip telescoping derrick.

WRITE FOR DETAILS

WALDRIP

ENGINEERING COMPANY

MAIN OFFICE AND PLANT: 11810 CENTER STREET, HOLLYDALE, CALIFORNIA
 San Joaquin Valley Division: 30th and M Sts., Bakersfield, Calif.



Here it is!

THE WALDRUP "321"—The only self-propelled servicing and drilling rig that drives into the location NOSE FIRST.

OUTSTANDING FEATURES

- Faster spotting at well location. • Better balance with less weight.
- Less load over front wheels. • Clear operating vision. • Easily accessible motor in rear. • Unit completely guarded by smooth, streamlined contour guards. • Furnished with gas, gasoline, butane or Diesel engine. • Furnished with torque converter or gear box.
- Equipped with 65', 60,000 = or 90,000 = hook load capacity Waldrup telescoping derrick.

WRITE FOR DETAILS

WALDRUP ENGINEERING COMPANY

11810 Center Street

Hollydale, California

EX 17 - EX - T

PATENTED FILE
TURN TO RECORD ROOM
 NUMBER (Serial of 1948)

35666

1948

PATENT NO. 1537

DATED 1934
(EX'R'S BOOK) 123-10

DIV. 33

JAMES MOON

to Western Oil & Gas Co. Inc. & its subsidiaries

ALT/DENA

CALIFORNIA

DERRICK MOUNTING FOR PORTABLE DRILLING AND SERVICING RIGS

ORIGINAL

APPLICATION FILED COMPLETE JUNE 28 1948

SETS OF APPLICATION FILED

Petition, Specification,	<u>JUNE 28</u> <u>1948</u>
Oath, First Fee \$40	
<u>4</u> sheets Drawings,	

This is to certify that annexed hereto is a true copy from the records of the United States Patent Office of the file wrapper and contents of the file identified above.

By authority of the
COMMISSIONER OF PATENTS

May 13, 1957
Date

Cliff Vanham Jr.
Certifying Officer

Case No. 279 57 NM
Minn vs. Cal
Dist. EXHIBIT T
 Date MAR NO. 1 IDENTIFICATION
 Date MAR NO. 1 IN EVIDENCE
 Clerk, U. S. District Court, Sou. Dist. of Cal.
Chas. L. Anex Deputy Clerk

PAT-80

RECEIVED ONLY
THE COMMISSIONER OF PATENTS
WASHINGTON 25, D. C.DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Form No. 3

All communications respecting
this application should give the
serial number, date of filing,
and name of the applicant.Please find below a communication from the EXAMINER
in charge of this application.*Lawrence G. Kierse*
Commissioner of PatentsMAILED
OCT 18 1949Philip Subkow
435 Roosevelt Building
Los Angeles 14, California

Division: 33 - Room 5027

Applicant: James Moon

Ser. No. 35,666

Filed: June 28, 1948

For: DERRICK MOUNTING FOR
PORTABLE DRILLING AND SERVICING
RIGS

This application has been examined.

Reference made of record:

McEwen et al.	2,331,553	Oct. 12, 1943	189-14
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References of interest:

1 Dow	2,175,381	Oct. 10, 1939	189-14
2 Woody	2,204,716	June 18, 1940	189-11
3 Fleischmann	2,471,735	May 31, 1949	254-86
7 Donley et al.	2,251,013	July 29, 1941	255-19.1

Claims 1-5 are rejected as failing to patentably differ from the patent to McEwen et al. Applicant has merely taken McEwen's derrick structure and reversed the position, enclosing McEwen's standards (7) in the cab of the truck and causing the derrick to be raised forward of the truck rather than to the rear of the truck. Applicant's change of position is a matter of mechanical expedience and is not considered to involve invention.

[Signature]
Examiner

DMS/co

MAIL DIVISION

100-111

U. S. PATENT OFFICE

APR 11 1950

DIVISION 33

Div. 33
Room 5087
JAMES MOON
DERRICK MOUNTING FOR PORTABLE
DRILLING AND SERVICING RIGS
Filed June 28, 1948
Serial No. 35,666

Los Angeles, California, April 5, 1950

Hon. Commissioner of Patents
Washington 25, D.C.

Sir:

In response to Office action dated October 18,
1949, please amend the above-identified Application as
follows:

Add the following new claim:

446. A portable drilling derrick, comprising
a vehicle chassis, front and rear wheels for said chassis,
the ends of the legs of said derrick protruding ahead of
said front wheels and the top end of said derrick being
positioned toward the rear of said chassis, a hinge on said
derrick, said hinge being mounted at the front end of said
chassis, and means positioned on said chassis to rotate said
derrick about said hinge point to move said derrick to an
erect position. ***

REMARKS

The rejection is traversed.

The applicant, in reversing the position of the
derrick so that the truck can drive head-on into position
and need not back into position, has obtained advantages not
possible with the cited prior art structures.

The McEwen reference is no different from the
White Patent No. 2,204,713 cited at page 1, line 21, of the

17

Ser. 35,666 - - - - -

End of
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C
C
In. C
7

12. A portable drilling device comprising a truck chassis, ^{*arrives*} ~~the~~ ^{*fixed*} ~~cab~~ mounted on the front end of said chassis, front and rear axles for said truck, wheels mounted on said axles, standards mounted on said chassis and extending rearward from the front end of said chassis, a derrick mounted on said standards, the top end of said derrick being pivoted toward the rear of said chassis, and means to rotate said derrick to an upright position ^{*at the rear end*}.

In. C
C

13. A portable drilling device comprising a truck chassis, ^{*arrives*} ~~the~~ ^{*fixed*} ~~cab~~ mounted on the front end of said chassis, front and rear axles for said truck, wheels mounted on said axles, standards mounted on said chassis and extending rearward from the front end of said chassis, a derrick mounted on said standards, the top end of said derrick being pivoted toward the rear of said chassis, and means to rotate said derrick to an upright position ^{*at the rear end*}.

14. A portable drilling device comprising a truck chassis, ^{*arrives*} ~~the~~ ^{*fixed*} ~~cab~~ mounted on the front end of said chassis, front and rear axles for said truck, wheels mounted on said axles, standards mounted on said chassis and extending rearward from the front end of said chassis, a derrick mounted on said standards, the top end of said derrick being pivoted toward the rear of said chassis, and means to rotate said derrick to an upright position ^{*at the rear end*}.

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12. A portable drilling derrick comprising a truck chassis, a driver's cab fixedly mounted on the front end of said chassis front and rear axles for said truck, wheels mounted on said axles, standards mounted on said chassis and positioned in said cab ahead of said front axles, a derrick hingedly mounted on said standards, the top end of said derrick being positioned toward the rear of said chassis, and means to rotate said derrick to an upright position about the said hinge.

13. A portable drilling derrick comprising a truck chassis, a driver's cab fixedly mounted on the front end of said chassis front and rear axles for said truck, wheels mounted on said axles, standards mounted on said chassis and positioned in said cab ahead of said front axles, a derrick hingedly mounted on said standards, the top end of said derrick being positioned toward the rear of said chassis, and an extensible jack hingedly mounted on said chassis at a point rearward of said front axles, said jack being hingedly mounted on said derrick at a point rearward of the hinge point of said jack to said chassis. - - -

REMARKS

The above claims are believed patentable for the reasons advanced in the amendment dated April 5, 1950. Each of said claims is directed to the feature whereby the derrick may be driven onto the job head-on. Each of the claims calls for the top end of the derrick to be positioned toward the rear of the chassis. This is in contradistinction to the prior art in which the top of the derrick is positioned toward the front end of the chassis.

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The claims differ from the claims in the case in omitting the specific recitation of the provision of the ends of the legs of the derrick. It is believed that the applicant is entitled to claims which in scope will cover the use of removable legs or other expedients to avoid the language of the claims while employing the essence of the invention. While it may be true that the original claims may cover such variation under the doctrine of equivalence, applicant, it is believed, is entitled to claims in language broad enough to cover this variation without resort to that doctrine.

Respectfully

Philip Surkov
Philip Surkov
attorney for applicant

PC:AC

Ser. 35,666 - - - - - 4

The claims differ from the claims in the case in omitting the specific recitation of the provision of the ends of the legs of the derrick. It is believed that the applicant is entitled to claims which in scope will cover the use of removable legs or other expedients to avoid the language of the claims while employing the essence of the invention. While it may be true that the original claims may cover such variation under the doctrine of equivalence, applicant, it is believed, is entitled to claims in language broad enough to cover this variation without resort to that doctrine.

Respectfully

PHILIP SUBKOW

Philip Subkow

Attorney for Applicant

PS:EC

POL-40

ATTORNEY ONLY
THE COMMISSIONER OF PATENTS
WASHINGTON 25, D. C.

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Paper No. 7

All communications regarding
this application should give the
serial number, date of filing,
and name of the applicant.

Please find below a communication from the EXAMINER
in charge of this application.

Philip Subkow
800 Roosevelt Building
Los Angeles 14, Calif.

John A. Marshall

Commissioner of Patents.

Division: 33
Applicant: James Moon

Ser. No. 35,566
Filed June 26, 1948
For DERRICK MOUNTING
FOR PORTABLE
DRILLING AND
SERVICING RIGS

JAN 31 1951

Responsive to the amendments filed

April 10, 1950 and June 22, 1950.

Additional references applied to the claims:

✓ Preston	414,574	Nov. 5, 1889	228-6
✓ Steck	377,424	Mar. 13, 1886	228-6
✓ Kim	443,094	Dec. 23, 1890	228-6
✓ Haines	855,771	June 4, 1907	228-8
✓ Fiedler	2,496,706	Feb. 7, 1950	61-74
	(Filed Aug. 2, 1946)		

On page 5, lines 15 and 22 and in

Figures 1 and 3, character "25" has been used to
denote two different elements.

Claims 1, 3, 4, 6 to 9, 11 and 12 are
rejected as substantially met by the patent to
Fiedler. The Fiedler patent discloses a wheeled
vehicle having a derrick hinged at a location for-
ward of the front wheels and means to raise said
derrick member. Provision of a cab at the forward
end of the Fiedler vehicle is deemed to involve no
invention.

Claims 1, 3, 4, 6 to 9, 11 and 12 are
further rejected as unpatentable over the patent to
Kim or Steck or Preston, cited above, in view of

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Serial No. 35,666

- 2 -

McEwen et al., of record. It would involve no invention to substitute a derrick member, for example, as taught by McEwen et al., for the ladder members disclosed by either Kim or Steck or Preston, or to provide the ladder trucks with a cab at the forward end.

Claims 2, 5, 10 and 13 are rejected as unpatentable over Fiedler in view of Haines. In addition to the remarks set forth in the rejection of claims 1, 3, 4, 6 to 9, 11 and 12, it would involve no invention to substitute the jack means of Haines for the derrick hoisting means of Fiedler.

Claims 2, 5, 10 and 13 are further rejected as unpatentable over Kim or Steck or Preston, taken with McEwen et al., in view of Haines. In addition to the remarks set forth in the rejection of claims 1, 3, 4, 6 to 9, 11 and 12, it would involve no invention to substitute the jack means of Haines for the derrick erecting mechanism disclosed by either Kim, Steck or Preston.

Claims 1 to 13, inclusive, are rejected.

EJH:rp

M. J. Throckmole
Examiner

Serial No. 35,666

- 2 -

McEwen et al., of record. It would involve no invention to substitute a derrick member, for example, as taught by McEwen et al., for the ladder members disclosed by either Kim or Steck or Preston, or to provide the ladder trucks with a cab at the forward end.

Claims 2, 5, 10 and 13 are rejected as unpatentable over Fiedler in view of Haines. In addition to the remarks set-forth in the rejection of claims 1, 3, 4, 6 to 9, 11 and 12, it would involve no invention to substitute the jack means of Haines for the derrick hoisting means of Fiedler.

Claims 2, 5, 10 and 13 are further rejected as unpatentable over Kim or Steck or Preston, taken with McEwen et al., in view of Haines. In addition to the remarks set-forth in the rejection of claims 1, 3, 4, 6 to 9, 11 and 12, it would involve no invention to substitute the jack means of Haines for the Derrick erecting mechanisms disclosed by either Kim, Steck or Preston.

Claims 1 to 13, inclusive, are rejected.

W. J. MUSHAKE

EGH:rp

Examiner

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Ser. 35,666 - - - - - 6

end of the vehicle.

(This also distinguishes from Fiedler, McEwan and Woody)

All the claims are limited to the fixedly positioning of the cab in the chassis. All claims recite the cab and the controls in the cab and the adjacent mounting of the derrick hinge point.

This should distinguish claims 1, 3, 4, 6 to 9, 11 and 12 from Fiedler, and from Kim or Steck or Preston even when taken with McEwan, et al.

This should also distinguish claims 2, 5, 10 and 13 from Fiedler in view of Haines, since the basic reference fails to meet the claims, or Kim or Steck or Preston taken with McEwan et al in view of Haines.

Simply stated, the idea of pivoting the rear end of the derrick adjacent the cab, so that the driver can drive into location and see the derrick legs as they move into position on the ground, is not shown by the prior art. Applicant's device does this; the prior art does not.

Reconsideration and allowance of all the claims are requested.

Respectfully

PHILIP SUBKOW

Philip Subkow

Attorney for Applicant

PS:EC

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 INFORMATION IS IN IT

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Parish No. 100

All communications regarding this application should give the serial number, date of filing, and name of the applicant.

Please find below a communication from the EXAMINER in charge of this application.

John A. Marshall

Commissioner of Patents

Keywords: *Teacher education, Teacher education, Teacher education*

Ser. No. 13, 193

Filed: 7/16/2013

Fur

MAIL 57

APR 28 1962

FATTEN
DIVISION

4. 10. 1944

16. $\frac{1}{2} \pi$

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Responsive to amendment filed July 30, 1951.

Additional references applied to the claims:

Luckett	2,406,620	Aug. 27, 1946	212-8
Deist	2,315,942	Apr. 6, 1943	212-8

Additional reference of interest:

Cornett	2,335,172	Nov. 23, 1943	255-51V
---------	-----------	---------------	---------

Claims 1-5 and 7-13 are rejected on the ground of multiplicity. The large number of claims presented provides for no material benefit to the applicant but merely tends to confuse and obscure the invention, if any. The number of claims can be greatly reduced to perhaps one without sacrificing scope, clarity or protection. Further, the claims, as presented, are not patentably distinguishable over each other. For example, claim 8 differs from claim 7 only by reciting that the rotating means is mounted on the chassis, however this slight difference is not considered to lend any patentable merit to the claim. See *In re Spencer* 407 O.G. 861.

Claims 1-5 and 7-13 are further rejected as unpatentable over *Donley et al* or *Luckett* in view of *McEwen et al*. The *McEwen et al* patent discloses a portable derrick 10

Serial No. 35,666

-2-

hinged to standard 7 and elevated by the hydraulic means 22 which is pivotally mounted to the trailer 2 by the pivot 21. The pivot 21 of the hydraulic means 22 and theerrick hinge are each disposed on opposite sides of the trailer wheel axes. The applicant's structure differs from the prior art structure merely by pivoting theerrick at the front end of a truck to enable easier location of theerrick bottom at the drilling site. The contents of Dunley et al and Luckett, respectively disclose a tower and boom pivotally secured to the front end of a truck. Applicant is urged to read care one of the Dunley et al specification which sets forth the particular advantages of pivoting the tower 115 at the front end of the truck. Providing either the Dunley et al or the Luckett structures with theerrick, standards and hydraulic relative means of McEwen/in lieu of the tower and boom structure and their respective elevating means disclosed by Dunley et al and Luckett is not considered to involve inventive merit/as warrant allowance. Locating theerrick hinge and the lower pivot of the hydraulic means forwardly and rearwardly respectively of the front wheels is fully taught by McEwen et al. Should it be desired to locate theerrick hinge over the vehicle end, for example as disclosed by Wist, such provision would entail mere mechanical skill.

Applicant should prepare this case for final action by his next amendment.

Claims 1-5 and 7-13 are rejected.

E. D. H.
Examiner

E. D. H.
Examiner

43

35666

Serial No. 35,666

-2-

hinged to standards 7 and elevated by the hydraulic means 22 which is pivotally mounted to the trailer 2 by the pivot 21. The pivot 21 of the hydraulic means 22 and the derrick hinge are each disposed on opposite sides of the trailer wheel axles. The applicant's structure differs from the McEwen et al structure merely by pivoting the derrick at the front end of a truck to enable easier locating of the derrick bottom at the drilling site. The patents to Donley et al and Luckett, respectively disclose a tower and boom pivotally secured to the front end of a truck. Applicant is urged to read page one of the Donley et al specification which sets forth the particular advantages of pivoting the tower 145 at the front end of the truck. Providing either the Donley et al or the Luckett structures with the derrick, standards and hydraulic rotative means of McEwen et al in lieu of the tower and boom structure and their respective elevating means disclosed by Donley et al and Luckett is not considered to involve inventive merit as to warrant allowance. Locating the derrick hinge and the lower pivot of the hydraulic means forwardly and rearwardly respectively of the front wheels is fully taught by McEwen et al. Should it be desired to locate the derrick hinge over the vehicle cab, for example as disclosed by Deist, such provision would entail mere mechanical skill.

Applicant should prepare this case for final action by his next amendment.

Claims 1-5 and 7-13 are rejected.

W. J. MUSHAKE

EGH:tah

Examiner

End 4
D'
Ser. 35,666 -----5

bearing away from said truck at an acute angle to the vertical when said derrick is in ~~an~~ erect position. 1-44

R E M A R K S

The applicant wishes to express his appreciation for an oral interview had with the Examiner in February of 1952, prior to the issuance of the last Office action. At that time the references in the case were discussed, proposed claims were informally submitted, and the Examiner indicated that a claim similar to new claim 14 would be, in his view, favorably considered if presented. One of the features which the Examiner indicated as possibly carrying the claim over the then cited references was the straddling of the cab by the derrick when erected. It is respectfully urged that the new references do not in any way meet this claim, either alone or in combination with the cited references. The additional claims 15 to 17 are likewise patentable.

The rejection:

Applicant understands the rejection to be as follows:

(1) McEwen shows an oil derrick of the same class as is used by applicant.

(2) Derricks have been mounted on trucks so that they are hinged at the front end of the truck and Donley points out that in so doing the driver can drive directly to the spot where he wishes to erect the derrick. Derricks have been hinged on the top of the cab of cranes (Leist); and that

(3) Therefore, there is no invention in doing the same thing in the McEwen derrick, and no invention in hinging the derrick on the front of the derrick and over the cab.

Ser. 35,666 - - - - - 5

bearing away from said truck at an acute angle to the vertical when said derrick is in an erect position.

REMARKS

The applicant wishes to express his appreciation for an oral interview had with the Examiner in February of 1952, prior to the issuance of the last Office action. At that time the references in the case were discussed, proposed claims were informally submitted, and the Examiner indicated that a claim similar to new claim 14 would be, in his view, favorably considered if presented. One of the features which the Examiner indicated as possibly carrying the claim over the then cited references was the straddling of the cab by the derrick when erected. It is respectfully urged that the new references do not in any way meet this claim, either alone or in combination with the cited references. The additional claims 15 to 17 are likewise patentable.

The rejection:

Applicant understands the rejection to be as follows:

(1) McEwen shows an oil derrick of the same class as is used by applicant.

(2) Derricks have been mounted on trucks so that they are hinged at the front of the truck and Donley points out that in so doing the driver can drive directly to the spot where he wishes to erect the derrick. Derricks have been hinged on the top of the cab of cranes (Deist); and that

(3) Therefore, there is no invention in doing the same thing in the McEwen derrick, and no invention in hinging the derrick on the front of the derrick and over the cab.

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and name of the applicant.

Form No. 12

Philip Subkow
800 Roosevelt Bldg.
Los Angeles 11, Calif.Please find below a communication from the
EXAMINER in charge of this application.*James H. Sullivan*
Commissioner of Patents*Robert C. Johnston*

Applicant:

James H. Sullivan

Ser. No.
35,666Filed
June 28, 1948For
DERRICK MOUNTING FOR
PORTABLE DRILLING AND
SERVICING RIGS

MAILED

MAY 28 1952

PAT.
DIV. 33

Responsive to amendment filed September 16, 1952.

Claims 14, 15 and 17 are rejected as being functional. The statement "the legs...extended position", appearing in the last two lines of claim 14 and the last three lines of claim 15 and the phrase "the width...erect position" in lines 10-21 of claim 17 are believed to recite a desired result without the inclusion of sufficient structure enable one performing such result. The claims should specifically set forth the particular width relationship of the derrick legs and the cab and also the location of the cross-bracing elements so as to indicate that said derrick legs will straddle the cab without interference with said cab or cross-bracing.

Claims 16-17 are rejected as being indefinite. In line 1 of each of the claims the term --consisting of-- should be inserted after "serviced". In claim 16, line 3 "in" should read --on-- and in lines 20 and 21, the phrase "the front legs of said chassis" appears to be incorrect insofar as the chassis is on front legs. The rear legs of the service, as set forth in the specification, and not the front legs, as stated in line 10 of claim 1, straddle the cab.

Claim 16 is rejected as unobvious over Kelley et al. in respect to view of claim 16, 1948, 2, 200, 000. The

Responsive to amendment filed September 18, 1952.

Claims 14, 15 and 17 are rejected as being functional. The statement "the legs extended position", appearing in the last two lines of claim 14 and the last three lines of claim 15 and the phrase "the width erect position" in lines 18-21 of claim 17 are believed to recite a desired result without the inclusion of sufficient structure capable of performing such result. The claims should specifically set forth the particular width relationship of the derrick legs and the cab and also the location of the cross-bracing elements so as to indicate that said derrick legs will straddle the cab without interference with said cab or cross-bracing.

Claims 14-17 are rejected as being indefinite. In line 1 of each of the claims the term—consisting of—should be inserted after "derrick". In claim 15, line 6 "in" should read—on—and in lines 23 and 24, the phrase "the front legs of said chassis" appears to be incorrect insofar as the chassis has no front legs. The rear legs of the derrick, as set forth in the specification, and not the front legs, as stated in line 19 of claim 17, straddle the cab.

Claim 16 is rejected as unpatentable over Donley et al or Luckett in view of McEwen et al, all of record. The

Ser. No. 35,666

- 2 -

Donley et al and Luckett patents each disclose a structure having a chassis having rear and front wheels, a drivers cab at the front end of the chassis, a boom or tower structure pivotally mounted at the front end of said chassis and boom or tower actuating means. Substituting the McEwen et al derrick member and elevating means for the boom or tower means of Donley et al or Luckett is deemed to entail no inventive skill as to warrant allowance. Pivotaly securing the substituted derrick of McEwen et al on the top of the Donley et al or Luckett cab is believed to provide for no new or unobvious results as to lend patentable significance to the claim and is believed to be well within the purview of the skilled artisan.

Upon satisfactory correction of claims 14, 15 and 17 along the lines indicated above, such claims will appear to be allowable.

An issue having been reached, this action is made

FINAL.

EDH
EDH:lfs

W.D. Shushak
Examiner

Serial No. 35,666-----#5

The present amendment includes two changes overlooked at the above-mentioned interview. In claim 19, line 36, "lower" is cancelled since the antecedent for "said leg portions" at line 34 does not include "lower". In claim 20, lines 36 and 37, "the portion of . . . to the ground" is changed to "a lowermost portion of the derrick". This change is made because it more accurately coincides with the disclosure. These changes remain wholly within the spirit of the understanding reached at the conference.

Claim 22 is allowable because it is similar to claim 19 and recites structure which lends patentability to the claims. Claim 22 is directed to a collapsible and extensible portable derrick hingedly mounted upon a mobile chassis for erection adjacent the front end of the chassis. It further defines means for placing the derrick legs in load transference relationship with the ground; and defines the relative location of parts placing one pair of front and rear derrick legs with their respective load transference means to one side of the driver's position, and the other pair of front and rear derrick legs with their respective load transference means to the other side of the driver's position, with the derrick in erect position. This claim further carries the added specific limitation over claim 19 of placing the motive power unit in the rear of the chassis.

Serial No. 35,666 - - - - - - - #5

The present amendment includes two changes overlooked at the above-mentioned interview. In claim 19, line 38, "lower" is cancelled since the antecedent for "said leg portions" at line 34 does not include "lower". In claim 20, lines 36 and 37, "the portion of . . . to the ground" is changed to "a lowermost portion of the derrick". This change is made because it more accurately coincides with the disclosure. These changes remain wholly within the spirit of the understanding reached at the conference.

Claim 22 is allowable because it is similar to claim 19 and recites structure which lends patentability to the claims. Claim 22 is directed to a collapsible and extensible portable derrick hingedly mounted upon a mobile chassis for erection adjacent the front end of the chassis. It further defines means for placing the derrick legs in load transference relationship with the ground; and defines the relative location of parts placing one pair of front and rear derrick legs with their respective load transference means to one side of the driver's position, and the other pair of front and rear derrick legs with their respective load transference means to the other side of the driver's position, with the derrick in erect position. This claim further carries the added specific limitation over claim 19 of placing the motive power unit in the rear of the chassis.

No. 16132

IN THE
United States Court of Appeals
for the Ninth Circuit

JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW,

Appellants,

VS.

CABOT SHOPS, INC., and HOWARD SUPPLY
COMPANY,

Appellees.

APPELLANTS' OPENING BRIEF

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FILE

FEB 28 1958

FILED 6 2 1958

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IN THE
United States Court of Appeals
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JAMES MOON, EDMOND M. WAGNER and
PHILIP SUBKOW,

Appellants,

vs.

CABOT SHOPS, INC., and HOWARD SUPPLY
COMPANY,

Appellees.

APPELLANTS' OPENING BRIEF

I

STATEMENT OF PLEADINGS AND OF
FACTS RELATING TO JURISDICTION

The District Court had jurisdiction of this action under the Patent Laws of the United States, Title 35 of the U. S. Code, and Title 28 of the U. S. Code, Sec. 1338(a).

The Pleadings consist of a complaint (Record p. 3) alleging infringement by defendants Cabot Shops, Inc.

and Howard Supply Company of the U. S. Letters Patent 2,671,537 (Ex. 1, Record p. 638) which, as will appear, relates to a portable derrick such as is used on oil wells and which is mounted on a hinge positioned above the driver's position at the front end of the truck so that it may be erected at the front end of the truck, all as will be more specifically set forth hereinbelow.

An answer was filed denying that the patent was duly or legally issued, alleging (par. 2) that the claimed invention did not constitute invention over the prior art "as it existed at the time of the alleged inventions thereof"; (Par. 5, Record p. 6) that they were disclosed in prior publications and Letters Patent (par. 6) and were in public use prior to Moon's invention and for more than one year prior to the filing date of the Moon patent (par. 7) and denied infringement (par. 3).

The issues presented by the Complaint and Answer were further formulated specifically by means of Interrogatories and a Pretrial Conference Order.

A. ISSUES RELATING TO VALIDITY AND INFRINGEMENT

The only issues of law and fact to be litigated were fixed by the Pretrial Conference Order (Ex. 101, Record pp. 57-64).

1. Only the following issues of fact were to be litigated upon the trial (see Pretrial Conference Order VI, Record p. 62).

(a) All facts stated in Plaintiffs' Pretrial Statement of Facts (Record pp. 28-49) and De-

fendants' Pretrial Opening Statement (Record pp. 49-56) not admitted to be true under Par. III of the Order (Record pp. 57-61). See also Par. IV of the Order (Record p. 61) and the Issues of Fact corresponding to the Issues of Law as set forth in Par. VIII of the Order (Record p. 62 & 63).

2. Only the certain Issues of Law, set forth below, were to be litigated. (Pretrial Conference Order, Par. VIII, Record pp. 62 & 63).

3. These issues were further narrowed by the following answers to Plaintiffs' Interrogatories (see Stipulation, Record pp. 86 & 87):

(a) Answer to Interrogatory Nos. XXI and XXIV, filed February 21, 1958 (Record pp. 24, 25 & 27, Ex. 102):

"Interrogatory No. XXI

Answer: Defendant is presently without independent knowledge as to the date of the making of the alleged invention by the plaintiff Moon. Defendant will not rely upon evidence as to the prior art other than patents and publications previously called to the attention of plaintiffs except for Waldrip advertisements appearing in journals and publications in 1946 and 1947." (Record p. 24)

"Interrogatory No. XXIV

Answer: Defendant will rely upon the following patents to disclose the elements of the alleged invention:" (Ex. 16 Patents) (See Attached List) (Record pp. 25, 26 & 27)

(b) Answer to Interrogatory XXV (Record p. 26): "Answer: Defendant withdraws the defense of prior public use."

(c) Answers to Interrogatories XXI, XXII, XXIII and XXIV (Ex. 103) (Record pp. 85 & 86):

"ANSWER: Further answering Interrogatories XXI, XXII and XXIII, the evidence to be relied upon by defendant, Cabot Shops, Inc., as to prior art will consist of the patents and publications, copies of which appear in connection with Exhibits M, N, O, P, Q, R, S and T. Defendants accept December 16, 1946 as the date upon which Mr. James Moon made the alleged invention of the patent in suit." (Record p. 85).

It was stipulated that the date December 16, 1946, as given in the answer should read December 12, 1946, as the date of the invention. (Record p. 121).

"Interrogatory XXIV

Answer: Further answering Interrogatory XXIV, defendants are currently of the opinion that the patents to Morton and Evans, copies of which appear in Exhibit S, are the best references." (Record pp. 86 & 128)

Counsel for defendant reaffirmed this answer with an amendment including the Downie patent (Record p. 368).

The advertisements (Exhibits M, N, O, P, Q and R) were not offered as prior art under Section 103 of Title 35 but as anticipations under Section 102(b) of Title 35 (Record pp. 493 & 494).

4. With regard to the patents introduced in connec-

tion with Exhibit T (see Ex. T-1) it was stipulated in open court by appellees' counsel, Mr. Kenway, that the patents in Exhibit T-I are offered for the limited purpose of aiding the interpretation of the file wrapper and were not offered on the issue of validity and were accepted into evidence for the limited purpose to aid in the interpretation of the file wrapper (Record pp. 300-302; 362-365).

5. The issues thus formulated by the Pleadings, the Answers to Plaintiffs' Interrogatories and Pre-trial Conference Order (Record pp. 62 & 63) were:

(a) As to validity:

(i) "1. (a) Was the invention, claimed in the claims of the patent in suit, patented or described in any printed publication, cited by defendant Cabot Shops, Inc. in its answer to Plaintiffs' Interrogatories, before the invention thereof by James Moon?"

Note: The patents thus cited are those given in the Answers to Interrogatories XXI to XXIV and XXIII, and the publications are those given in the above Answers to-wit, those included in Exhibits M, N, O, P, Q, R and S. Since the date of invention was admitted to be December 12, 1946, and since, as will be discussed further in this brief, the dates of publication of Exhibits M through R were later than that date, only certain of the patents of Exhibit S are effective either as patents or as publications prior to December 12, 1946, and are material to this issue which, in this limited form, arises under Title 35, U.S.C., Sec. 102(b). This was

admitted. (See *supra*). Of the patents included in Exhibit S, the Evans patent was patented on November 15, 1949. Since this date is the effective date of the Evans patent either as a patent or publication, this patent is not material to the above issue of law which arises under Section 102(b) Title 35 U.S.C. This leaves of the so-called "best reference" relied on by Appellees only the Morton patent and perhaps the Downie patent.

(ii) "(b) Was the invention patented or described in a printed publication in this country, cited by said Defendant in its answers to Plaintiffs' Interrogatories, more than one year prior to the filing of the application for the patent in suit?"

Note: This issue arises under Section 102(b) Title 35. The filing date of the patent in suit is June 28, 1948. This excludes the Evans patent.

(iii) "2. If the invention of the patent in suit is not identically disclosed in any of the aforesaid patents and patent publications, as referred to in Paragraph 1, subparagraphs (a) (b) above, is the difference between the subject matter sought to be patented by said patent and the said patents and publications such that the subject matter as a whole would have been obvious at the time the invention was made to persons having ordinary skill in the art to which said subject matter pertains?"

Note: The only patents and publications offered by appellees on this issue and having

an effective date prior to the date of invention are those in Exhibit S (other than the Evans patent) which were patented or published prior to December 12, 1946; this issue as to them arises under Title 35, U.S.C., Sec. 103.

(b) As to infringement:

(i) "3. Does the equipment as illustrated in the 1956 Catalog of defendant Cabot Shops, Inc., at page 1810 and in the 1957 Catalog pages 1883, 1884 and 1885, and manufactured and sold by said defendant and its predecessor, Franks Manufacturing Corporation, constitute an infringement of the claims of the patent in suit?"

Note: The 1956 catalog is in evidence as Exhibit 55, and the 1957 catalog as Exhibit 54. Portions of the pages 1810, 1883, 1884 and 1885 showing this equipment are reproduced in the Appendix. Sale of 16 such units and at least one in the Southern District of California was admitted and found as fact by the Court (Pretrial Conference Order, Ex. 101, Record p. 57, Par. III(8), Record p. 59 and Par. III(12), Record p. 60, incorporating Item 52 (a) and (d) and all subdivisions of (d), Record pp. 43 & 44, and Item 53 and all its subdivisions, Record pp. 43-44, and 54(a), Record pp. 44-45 of the Plaintiffs' Pretrial Statement of Facts; (see Finding of Fact #2, Record pp. 43-45).

(ii) "4. Has the defendant Howard Supply Company infringed the patent in suit by sale of any of the foregoing equipment?"

II

STATEMENT OF THE CASE

A. NATURE OF THE APPEAL

This is an appeal by appellants (Record p. 92) from a judgment (Record pp. 88-90) of the District Court dismissing the above complaint on the ground that none of the claims of the patent in suit have been infringed by appellees.

Appellees below have cross-appealed (Record p. 93) from that part of the judgment holding the patent in suit and each of the claims thereof good and valid in law.

B. THE PATENT IN SUIT

I. The Specification

The structure described by the patent (Ex. 1) relates to portable drilling and servicing units used for drilling of oil wells and also for servicing of oil wells after they are drilled.

A telescopic derrick is hingedly mounted above the driver's position at the front end of a truck. The engine is mounted on the rear of the chassis. Winches are positioned between the driver and the engine. The hinge is so positioned at the front end of the truck so that when transported the collapsed derrick lies above the engine and the driver with its bottom to the front of the truck. Means are provided to rotate the derrick on its hinge so as to erect the derrick at the front end of the truck. The derrick may then be extended to working height.

(a) The Chassis and Location of Engine and Winches

The chassis of the truck is formed of longitudinal frame members 11 (see Figs. 1 & 6) and front cross member 13 and rear cross member 12. The engine 4 is mounted on this chassis at the rear of the truck (see Figs. 1, 6 & 7). The cab 10 is positioned at the forward end of the chassis and the winches 6 and 7 are positioned on the chassis between the cab and the engine (Figs. 1 & 2).

(b) The Driver's Position

The driver's position in the cab is shown in Figs. 1, 3 and 6 where the seat, steering wheel and pedals are shown. Such controls are conventional in trucks. Because the cab is positioned adjacent the front wheels, where also the derrick is provided, the driver has an unobstructed view of the location where the derrick is to be erected. The patent states at column 2, line 31 et seq., "The driver in his cab position, where he has, as is conventional in trucks, all of the steering and driving controls, can see the derrick moving into position at all times and thus may, if he so desires, readjust his position with great facility."

(c) The Derrick and Derrick Hinge

The derrick 19 is a telescopic derrick in that it is composed of a lower and an upper section, the upper section being identified as 19. This may be extended when erected or retracted when returned to rest position (see col. 1, lines 1 to 16, and Figs. 1 & 3).

The derrick is hinged above the driver's position on two split bearings 16. The tubular cross member 17 of

the derrick is pivotally mounted on these bearings (see Figs. 6 & 11) which are positioned between the legs of the derrick. The bottom end of the derrick, provided with retractable leg extensions 41 (see Figs. 1, 3 & 4), extends to the front of the truck while the top end of the derrick is to the rear of the truck where it rests on a post 20 (see Fig. 1). The elevation of the hinge above the driver's position is such that when the derrick is in its retracted position it lies above the engine and winch (see Fig. 1).

(d) Derrick Hinge Support

The hinge is supported on a framework (see Figs. 6 & 11 and col. 3, lines 33 to 38). The framework consists of upright members 14 mounted on the chassis cross members 13 and the top hinge supporting cross members 15, with angle braces as will appear in Fig. 11, extending between 14 and 15, these angle braces being unnumbered. The framework is further reinforced and braced. Unnumbered members shown on Fig. 6 composed of an unnumbered angular member extending from bracket 26 to where the member joins an unnumbered vertical member adjacent thereto and by a cross member extending from the juncture of the unnumbered vertical members to member 14, as will appear in Fig. 6. There is one such structure on each side of the driver's position (see Fig. 11). The member 15 carries the hinge bearing 23 (see Fig. 11).

(e) The Transverse Extent of the Derrick Legs and Hinge Supporting Structure

The lower end of the derrick terminates in four legs, one front and rear leg forming a pair on one side

of the driver's position and another like pair on the other side of the driver's position. The transverse spacing of these pairs of legs and the arrangement of the support columns 14 and the cooperating hinge supporting structure on each side of the cab (see Figs. 11 & 14) gives to the driver a clear view of the well head and permits him to spot the truck accurately (see Ex. 1, col. 4, lines 18 to 26 and lines 59 to 69). As will be seen from Figs. 6 and 11, the hinge support columns 14 and cross member 15 are in front of the driver when he sits in the driver's seat position, and provides a protective framework to support the heavy load of the derrick to protect the driver and give him a clear view ahead (Record pp. 194-195; pp. 254 & 255).

(f) Derrick Erecting Means

The derrick erecting mechanism is composed of a pair of hydraulic jacks 27, one on each side of the truck. Each jack cylinder is hingedly mounted on a bracket 26 positioned one on each side of the truck on the chassis frame member 11 behind the cab. The extensible piston rods 28 of the jacks (see Figs. 1, 3, 6, 8, 9 and 10) are each hinged to the derrick by means of a split bearing 29-30 which are locked in place by a clamping bolt 32. The tubular cross frame member 33 of the derrick is journaled in the bearings (see Ex. 1, col. 3, lines 53 to 68). It will be observed that the hinges 25 are behind the front wheel axle and that the derrick extends both sides of hinges at 33 where each of the two jack extensions 28 is hinged to each side of the derrick.

(g) Operation of the Portable Derrick

(i) Over-the-Road Position and Spotting of the Derrick

In the over-the-road position (see Fig. 1), the upper section of the derrick is telescoped into the lower section and the feet 41 of the extensions of legs 25a are retracted so that the distance between the hinge point 17 and the derrick end is less than the height of the hinge point from the ground (Ex. 1, col. 3, lines 48-53; col. 4, lines 36 to 39). By making these extensions of the desired length, they may be telescoped back and the legs may be made to extend forward of the front end of the truck for a desired distance, as, for example, to give a three-foot overhang (Record pp. 198 & 199). As to the clear vision ahead and the driver's ability to accurately spot the derrick, see *supra* (b) of this Section B-1 page 9 and *infra*.

(ii) The Erection of the Derrick

The jacks 28', of which there are two, one on each side of the truck (see Figs. 6 and 10), are lowered from their dotted position in Fig. 6 and adjusted to wedge the truck into position (Ex. 1, col. 4, lines 27-32). With the jacks in position, the two jack 27 are extended and rotate about the hinge 25, causing the derrick to be lifted and rotated about the hinge at 17.

The arrangement of the erecting jacks 27 and the hinge points 33 and 17 cooperating with the chassis frame and the supporting structure for the hinge 17 and with the weight of the truck behind the bracket 26, produce the following balance of forces when the derrick is lifted (see Ex. 1, col. 4, lines 40-58, Record pp. 205-209) :

As the jacks 27 are extended, the derrick is lifted from its support 20 at the rear of the truck. It rests on the jack extension 28 with its greater weight to the rear of the hinge 33. This creates an upward pull or upthrust on the hinge supporting structure 14. At the same time the thrust of the jacks to raise the derrick creates a reactive thrust against the bracket 26 which is transmitted to the chassis frame member 11 as a thrust in the direction of the ground against the jacks 28'. This places the chassis frame members 11 in bending between the bracket 26 and the front cross member 13. The relatively short distance between the bracket 26 and the front cross member 13 limits the severity of this bending moment. The major portion of the derrick weight being, at this period during erection, located behind the hinge point at 33, the magnitude of the downward thrust at 26 added to the weight of the truck and equipment keeps the platform stable.

As the mast is raised, the center of gravity of the derrick moves forward in an arc above the driver's position and will at an intermediate point in the erection of the derrick arrive at a point directly over the hinge point of the jack 28 at the bracket 26 (see Figs. 1 & 6). As the derrick moves further forward to complete its erection, the load on the hinge 17 becomes a downward load which is exerted on the hinge supporting structure and is transmitted downward towards the chassis through the member 14 (see Fig. 6). This load is counterbalanced by the weight of the truck and its components. The load during erection of the mast is thus exerted on the chassis between the front and rear wheels as a downward load and this downward load added to the weight of the truck is greater at all

times than the load on that part of the chassis forward of both the derrick hinge location or of the front axle. A stable platform for the derrick during erection is provided throughout the erection operation. (Ex. 1, col. 2, lines 19 to 30; col. 4, lines 40 to 58, Record pp. 205-209).

When the derrick has reached its final erect position, the leg extensions are screwed down to rest on blocks 42 positioned on the ground. The derrick in common with portable derricks in the erect position has a slight forward tilt (see Fig. 6). The upper section is extended by means conventional in this art in connection with telescopic derricks. The patent refers to such derricks (see Ex. 1, col. 1, lines 1 through 25). The White patent 2,204,713 is in evidence as Exhibit 10 (Record p. 658).

(iii) The Transference of Derrick Loads to the Ground

The derrick carries the usual crown blocks and lines as is usual for derricks employed on oil wells. The line, hanging vertically, is at an angle to the center line of the derrick and to the four legs. (This is illustrated in Ex. 95 in the appendix and Ex. 35, Record p. 684). When the derrick is in operation the forces exerted on the derrick are carried to the ground on each side of the driver's position, through the legs to the ground and also through the cooperating members of the hinge support to the chassis and thus to the ground as follows: (see Record pp. 212, 213, 267, 269-285).

Mr. Moon at the above places in the Record used the patent and Exhibit 95 for the purpose of illustrat-

ing how the forces on the derrick are transmitted to the ground.

The load on the derrick is the load applied to the hook by the weight of equipment lifted from the well by the lines. The top of the derrick is connected by guy lines to the ground or to the truck and the guy lines act as a restraining pull at the top of the derrick. The wind loads may be exerted in a direction depending on the orientation of the structure with respect to the wind. These forces add vectorially and resolve into a vertical load down the legs of the derrick and a horizontal force which is directed forward of the truck. These forces are exerted against the hinge and against the hinge supporting structure. The forces on the hinge supporting structure are carried in the vertical member 14 and in the diagonal unnumbered member based at 26 (Fig. 6 of Ex. 1). (See Record pp. 212, 277). These loads are transmitted to the frame and to the jacks 28' (see R-3 on Ex. 95) positioned adjacent the bracket 26 (Record pp. 278 & 279).

The load thus reaches the ground through the legs of the derrick and through the hinge supporting structure including the hinge supporting truss members 14 and the angled member connected to the bracket 26, chassis frame member 13 and 11 and the jack 28' to the ground (see Figs. 3, 4, 6 & 10 of Ex. 1). It is to be noted that there are two legs and the cooperating truss and jack members on each side of the driver's position.

2. The Claims

The claims of the patent are set forth verbatim in outline form in Ex. 1A (Record pp. 647-656).

C. THE PROBLEMS SOLVED BY THE PATENT IN SUIT

Note: In the following discussion of the facts of this case reference will be made to the findings of fact (Record pp. 88-90). Finding #2 (Record p. 88) incorporates certain statements of fact which were, by the stipulated Pretrial Conference Order (Ex. 101, Record pp. 57-64), admitted and require no proof (Record p. 57 et seq.). Among these admitted facts (see Article III, Items 1-19, Record pp. 57 to 61) is Item 12 (see Record p. 60) which by reference included certain statements of fact appearing in plaintiffs' Pretrial Statements of Fact (Record pp. 28 to 48) and certain statements in Defendants' Pretrial Opening Statement (Record pp. 49 to 56).

In order to simplify documentation we will employ the following abbreviations: Findings of Fact (F); Pretrial Conference Order (O); Plaintiffs' Pretrial Statement of Fact (PS); and Defendants' Pretrial Opening Statement (DS). Thus (F #2 - O III 12 - PS 14, Record p. 31) will mean Item 14 of Plaintiffs' Pretrial Statement appearing at p. 31 of the Record was incorporated by reference in the Pretrial Conference Order, Item III-12, Record p. 60 and incorporated by reference in Finding #2. And (F #2 - O III 8, Record p. 59) means Item 8 of Article III of the Pretrial Conference Order appearing at p. 59 of the Record was incorporated by reference in Finding #2.

1. The Problem

Prior to 1938 most oil fields were equipped with

conventional permanent derricks located over each well. Such derricks are employed in producing wells to service the wells to repair or clean them out. They are important for such service on wells that employ a pump in the well since such wells require frequent servicing (Record pp. 149 & 150). The provision of such derricks at each well site constitutes a large capital investment (Record p. 150).

In 1939 Franks (Franks Manufacturing Co.), the predecessor of defendant Cabot Shops, Inc., produced a portable derrick mounted on a truck which made possible the servicing of many wells by one unit. This removed a forest of derricks from producing oil fields (Record p. 150).

Exhibit 12 shows such a unit. The unit employed a conventional truck, with the engine in the front and the driver behind the engine. The derrick was a lattice type telescopic derrick. The upper half of the derrick, carrying the crown block at its top, is telescoped into the lower half of the derrick. The derrick with its travelling block and lines rigged for service was carried on the truck with its top ahead of the front of the truck. (Record pp. 150 to 154). The derrick was hinged at the rear of the truck and was elevated by a screw raising mechanism such as is shown in the White patent (Ex. 10) and the Woody patent (Ex. 11) (Record pp. 158 to 160).

To erect this derrick, the truck was backed into location. (Record pp. 154-155). This type of portable derrick is termed a "back-in" unit in this litigation. (F #2 - O III 12 - PS 14a, Record pp. 31-32). The screw, operated to advance a cross head (see 7 of Fig. 1 of Ex. 10, Record p. 658, and 22 of Fig. 1 of Ex. 11, Record

p. 688) along a track or guide which extends beyond the end of the truck (see 8 of Fig. 17, Ex. 10; 15 of Fig. 1, Ex. 11 & Ex. 12), actuated a lever or pitman pivotally connected to the cross head and to the bottom end of the derrick rear legs. The derrick is swung about a pivot positioned on a truss mounted on the rear end of the truck and upon the overhanging track. The winch for actuating the lines of the derrick is positioned between the cab and the rear of the derrick.

The derrick was spotted in location by backing the truck into position. Jacks were placed under the track extending behind the end of the truck. The screw was operated to retract the cross head and the derrick was erected at the rear of the truck. The upper section was then extended from the lower section to operating position. Exhibit 13 shows the Franks back-in unit in position with the derrick partly erected, and Exhibit 14 shows similar unit at a different location, with the derrick erected and operating (Record pp. 135 & 136, 157).

Note: Exhibits 13 and 14 are included by stipulation as physical exhibits.

The above design presented a number of problems which seriously impaired the utility of the back-in unit. The petroleum industry demanded a unit which would free them of these difficulties and various expedients were tried by the manufacturers of portable units in an effort to provide better portable derricks. It was not until Moon's drive-in design was invented that the industry had a design which satisfied their needs.

(a) The Problem of Legality

The tremendous weight of the truck, engine, hoists, derrick and the other components required to be carried by the truck, taken together with the length of the telescoped derrick made the back-in unit illegal for transportation over the highways of many states. Special permits were required which restricted the movement of the truck to the daytime and good weather. Movement at nighttime hours and weekends and in bad weather was prohibited. The restriction on an operator whose well was down and not producing presented a hardship. He had to wait until a proper time to move the truck (Record p. 172).

The Vehicular Code of California as it existed prior to Mr. Moon's invention on December 12, 1946, placed serious limitations on the extent to which the derrick could protrude ahead of the front wheels or bumper, limiting it to three feet, and imposing limitations on the weight which may be imposed on the axles of a truck and also to the distance which a load carried by the truck may overhang the front of the vehicle. (See 1945 Vehicle Code of State of California, Chapter 2, Sections 694(a) and (b); 698(a); 704; 705(a) and (b); 708). (See Appendix) (See also Record pp. 166 to 168). Like provisions were also found in the Vehicular Codes of other states (Record pp. 168-170 & 172).

The back-in units did not comply with the law of such states and could not be made to comply with such laws (Record p. 178).

The following facts are admitted as true and were found by the Court:

"16. One of the difficulties with the back-in units was that they did not comply with highway laws of

the various states in that they could not be built so as to comply with:

(a) The limitations of loading on the front or rear wheels; or with

(b) The overhang requirements, or overall height requirements.

“17. Additionally, the position of the derrick was such that the top of the derrick had to protrude in front of the vehicle for more than was allowable under the Highway laws of many states.” (F #2 - O III 12 - PS 16 & 17, Record p. 32). (See also Record p. 599 and Defendants’ Answer to Plaintiffs’ Interrogatory at Record pp. 81-82 & 177).

(b) Problem of Safety

(i) The Problem of Stability

The back-in units provided an unstable platform for the erection of the derrick. Mr. Moon described by reference the Woody Patent 2,204,716 (Ex. 11) that as the derrick is raised, the back end of the truck is deflected upward to a serious extent. Jacks were provided to stabilize the rear end but the jacks left the ground until about two-thirds of the erection was accomplished (Record p. 162). He testified that this could be so serious as to cause the derrick to overturn and gave one example from his experience of the overturning of a derrick (Record p. 163).

The problem of the instability of the back-in design was also present when the derrick was erected. According to Mr. Woody, Chief Engineer of Defendant Cabot Shops, Inc., the derrick, when extended 96 feet into the air and the spread of the hinge point, where

the derrick was hinged to the rear of the truck, being of the order of 31½ inches, “didn’t give very much stability to a 96 foot structure” (Record p. 609). This was particularly true where it had to receive wind loads and also when it had to support the weight of pipes stacked on the derrick (see the stacks in Ex. 14). Mr. Woody testified that there was insufficient margin for this purpose in the back-in unit (Record p. 615).

(ii) The Limiation of Upward Vision

The long overhang of the derrick ahead of the driver of the back-in unit presented a hazard since it limited the upward vision of the driver. Mr. Moon gave an illustration of the seriousness of this hazard by reference to an accident he observed with the unit shown in Ex. 12. Because the driver’s upward vision was impaired, he could not gage the clearance under a bridge and jammed the truck under the bridge (Record pp. 147-148).

(iii) The Safety of the Driver

It will be seen that in the back-in unit (Ex. 12) there is a pair of posts positioned on the bumper which supports the front end of the derrick. It is termed a “headache post.” This and the cab is the only protection that the driver has. This structure is not sufficiently strong to protect the driver if the vehicle were moved while the derrick is erect or partly erect, nor does it afford much protection in case of an accident (Record pp. 255, 258). This evidence was uncontradicted. One can therefore understand the wry term “headache post,” remembering that the derrick weighs around 9,000 to 10,000 pounds (Ex. 1, col. 1, lines 37 et seq.).

(c) The Problem of Spotting

In order for the servicing unit to operate properly it is necessary to spot the truck with considerable accuracy in order that the top of the derrick when erected and extended be positioned so that the blocks for the derrick lines be centered within an inch or two of the center line of the well (see Ex. 14; Ex. 1, col. 1, line 49 to col. 2, line 6). If this be not done when the load is lifted an eccentric load is placed on the top of the derrick. If these are sufficiently large, they will load one side of the derrick more than the other side. In addition this would cause excessive line wear (Record pp. 155-156).

Realizing that in ordinary oil field practice expert truck drivers are not employed and ordinarily the well puller drives the truck, such accurate spotting is a difficult job for such drivers and requires time and depending on the location, the assistance of spotting aids (Record pp. 154-156, 434).

2. Moon's Solution of the Problem of the Portable Derrick

(a) The New Combination of the Components of a Portable Truck Mounted Derrick to Produce a Drive-In Unit

(i) The Abandonment of the Conventional Truck

The traditional approach which the industry had always used in designing a portable derrick which was hinged to the vehicle was to start with a conventional truck or semi-trailer unit such as is generally employed in the hauling industry.

Mr. Moon determined that if he is to design a legal unit which would be more easily spotted with improved stability and which would provide safety for the driver and clear vision for the driver, he would have to abandon the traditional approach and start with an entirely new concept. That this is a basic difference is admitted and incorporated as a finding by the Court:

“16. Conventional trucks as used in the construction of back-in units in which the derrick was carried to be hinged on the rear of the vehicle were not suitable to carry heavier derricks of the telescopic type. Not only were their structural characteristics insufficient, but the weight distribution was also unsuitable for engineering and legal reasons; the legal reasons being the necessity for compliance with the various highway codes of the various states. In building the drive-in units in which the derrick is hinged at the front of the truck it became feasible to custom build the unit to obtain a weight distribution which would be desirable and which would satisfy both engineering and legal requirements for such structure.” (F #2 - O III (16) Record p. 60-61)

(ii) The Arrangement of Components and the Distribution of the Weight Thereof

Mr. Moon testified that by abandoning the conventional truck design he was able to mount the winch on the chassis. (Record pp. 193 & 194).

By positioning the derrick so that it is hinged at the front of the truck and by positioning the weight of the motor and winch behind the cab, a weight distribution was achieved to give a legal loading on the front and

rear wheels, while the front overhang could be made to comply with the laws. When the conventional truck employing the Woody design, formerly employed by the appellees in their back-in units, the stacking of the screw raising frame and the winch frame on top of each other consumed space sorely needed to make the unit legal. (Record pp. 193 & 194).

Mr. Woody stated that it was impractical to make the back-in unit legal. The only way service units would be made legal was by abandoning the conventional truck and by going to the drive-in principle. (Record pp. 600, 601, 610-611, 615; F #2 - O III (16) *supra*)

**(iii) The Abandonment of the Screw Raising
Mechanism Used in the Truck Mounted
Back-In Unit**

In the back-in unit a raising device was used in which the erecting jack is hinged to the end of the derrick and at the overhang of the truck behind the rear wheels (see this Brief pp. 11 to 14). Mr. Moon testified that in his original concept he had at first intended to employ such a screw derrick raising mechanism and found that it was not practical in his drive-in unit, and he had to abandon it (Record pp. 183 & 184).

Mr. Woody testified that it was not possible to employ in the drive-in design, the screw raising mechanism of the Woody patent (Ex. 11) without substantial modification (Record p. 618).

This led Mr. Moon to choose the hydraulic jack as an elevating mechanism. This fortunate choice resulted in an improvement in the stability of the structure.

(iv) The Hinging of the Erecting Jack Between the Front and Rear Wheels

In the drive-in device, the erecting jack 27 (see Fig. 3 of Ex. 1, and this Brief, p. 11) is hinged to the main chassis between the rear and front wheels near the front end of the truck. In the back-in type a force is exerted during lifting which bends the rear end of the truck frame away from the ground and lifts the supporting jacks from the ground. (See this Brief, pp. 20-21). The modification introduced into the drive-in unit causes the forces to be downward in balanced position between the lever hinge and the derrick hinge without introducing excessive bending in the frame. (See this Brief, pp. 12-14).

It will be observed, as is described previously in this brief, that during the raising operation up to a point where the center of gravity of the mass of the derrick is on a vertical line over the derrick hinge point on the derrick hinge supporting framework, the thrust of the raising load is downward on the hinge of the jack on the chassis frame and through the jacks 27 and 28' into the ground. When the load passes over this center, the force exerted by the derrick load on the hinge support is also down and is balanced by the weight of the truck. At no time is the chassis placed into an upward deflection to lift the supporting jacks off the ground as are the jacks at the end of the truck in the back-in unit during raising.

The result is a stable platform, in the case of the drive-in unit, during raising whereas in the back-in unit, the platform is not stable.

Mr. Moon testified in detail as to the instability of

the back-in structure and the stability of the drive-in structure. (See this Brief, pp. 20 and 21).

This was admitted by Mr. Woody who testified that the drive-in unit gave a stable structure so that overturning could not occur. This advantage was not present in the back-in unit. (Woody Deposition, pp. 609-610, 615, 617-618).

The drive-in unit satisfied "engineering and legal requirements" while the back-in unit did not, as is admitted by the appellees and found by the Court (see this Brief, p. 23).

(v) Constructing the Hinge Supports to Extend to Each Side at the Front of the Vehicle

A further modification of the elements was made by providing in the front of the truck a hinge support so constructed to be positioned to each side of the driver's position. This structure provided a portal through which the driver could see as he moved into position. This structure also provided cooperating truss elements to cooperate with the legs, the chassis and the jack to carry the load to the ground. This load transference was through structures which were positioned to each side of the driver's position at the front of the truck. (See this Brief, pp. 14 and 15).

By arranging the legs and the hinge supporting structure (Column 14) and the diagonal cross bracing (unnumbered) terminating at the bracket 26 (Figs. 1 & 3 of Ex. 1), the loads are carried around the driver to the ground and no structure is in front of the driver

to obscure his vision. He has a clear portal through which he can see where he is going. In contrast, the driver of the back-in unit has his view of the spotting location blocked. His problem of spotting is thus very much greater than that faced by the driver of a drive-in unit. (See this Brief, pp. 9, 12, 21).

(vi) The Provision to Make the Hinge Support a Protective Framework for the Driver.

This hinge supporting structure in the drive-in unit also has the advantage in that it acts as a protective framework for the driver (Record pp. 255-256). Contrast this with the situation in the case of the back-in unit where no such safety feature is available. (See this Brief. p. 21).

Mr. Woody stated that the hinge supporting structure in the drive-in unit was a safety feature for the driver in case of an accident, such as a turnover (Record p. 616).

(vii) The Provision of the Hinge Support at the Front of the Truck where also the driver's position is located permits the hinging of the derrick above the driver's position so that the lower end of the derrick protrudes ahead of the truck.

This arrangement in cooperation with the hinging of the erecting jack provides for stability in raising the derrick (see this Brief, pp. 11, 12 & 24), as well as providing a protective framewrok for the driver and a clear view ahead.

It permits the positioning of the engine and winch on the truck to produce a distribution of the load

on the axle and wheels, to meet the requirements of the vehicular laws (see this Brief, p. 19 & 20).

It also permits the arrangement of the derrick so that the front overhang of the derrick meets the requirements of the vehicular laws.

This was accomplished by making the front legs of the derrick and its extensions so that the extension could be slid back for a distance to make the front overhang meet the legal requirements (see Record pp. 198-199, and this Brief, pp. 19 & 20). In California this limited the front overhang to 3 feet (see this Brief, pp. 19 & 20). The drive-in units thus could be made to meet the front overhang requirements of the laws of the various states (Records pp. 295, 601).

The weight distribution and the front overhang arrangement of the derrick resulting from hinging the lower end of the derrick at the front of the truck above the driver's position resulted in a unit which complies with the vehicular laws. (See this Brief, pp. 23 and 24).

(b) The Results Produced by the Drive-In Unit

(i) The Legality of the Unit

As stated previously the drive-in principle permitted the construction of a truck-mounted portable derrick which was legal under the vehicular laws of the various states such as to weight and front overhang. The back-in unit has not and could not be made legal and thus was excluded from the public roads unless specially permitted and then under serious restrictions. (See this Brief, p. 19).

(ii) The Stability of the Structure

The drive-in principle resulted in a structure which was more stable during erection of the derrick and in use than was the case in the back-in units. (See this Brief, pp. 20 & 25).

(iii) The Safety of the Driver

The drive-in principle provides a protective framework for the driver carrying the hinge on a framework that carries the load down to the ground on each side at the front of the truck. (See this Brief pp. 20 & 21).

(iv) The Ease of Spotting

The hinging of the derrick adjacent its lower end above the driver's position and the positioning of the load supporting structures to each side of the front of the truck provides a portal through which the driver has a clear view ahead and facilitates spotting of the derrick. He could drive directly into location and did not require the aid of other spotters for this purpose. (See this Brief, pp. 9, 12, 21).

That the drive-in principle facilitates the spotting of the derrick and that this is a marked improvement over the back-in principle is admitted and established by the evidence. As was discussed above, the accurate spotting of the truck is of prime importance and the placing of the back-in unit was a time-consuming and difficult job.

Mr. Woody testified that because the driver of the drive-in rig can see the point where he is driving he need not rely on signals from another man (Record p. 613).

Mr. Smyser, who is in the business of operating servicing units and had previously been a salesman of back-in units, gave examples from his experience of the difficulty and time-consuming nature of the spotting of the back-in units and of the ease and speed of spotting and of erecting the drive-in units (Record pp. 434 & 437). He stated that he operates drive-in units, and operators of the back-in units just can't compete with him and added that he has revolutionized the business in his area (Record pp. 435-436).

Mr. Hopper, who is a manufacturer of drive-in units, testified that the drive-in units have replaced back-in units. Mr. Hopper's company sells back-in units, pole masts, skid-mounted units, as well as drive-in derrick units. The drive-in units are sold for from \$40,000 for the smallest to \$100,000 per unit for the largest drive-in unit (Record p. 467). The drive-in units are more costly than the back-in units of comparable size (F #2-O III 19, Record p. 61). The catalog of Mr. Hopper's company is in evidence as Exhibit 47. Mr. Hopper stated that his sales of drive-in units in California constitute 80% of the total sales of all types of transportable units, including back-in, drive-in and skid-mounted units, and throughout the United States the drive-in unit accounts for 50% of the sales of all types, including back-in truck units, semi-trailer units and skid-mounted units; that is, the drive-in unit outsells every other type of unit (Record pp. 468-469).

Mr. Hopper stated that one of the reasons why the more costly drive-in units outsell the back-in units is the ease of spotting of the unit (Record pp. 469-470).

That these and other advantages and utilities of the drive-in unit are a material contribution to its value as an improved portable servicing unit and marks the drive-in unit as an important contribution to the art of portable oil field servicing derricks, appears fully supported by appellee's admissions and by the stipulated facts of the Pretrial Conference Order which were incorporated as findings by this Court.

Appellee Cabot Shops, Inc., in its 1956 catalog (see Ex. 55, pp. 1803, 1804 and 1806), stated:

On Page 1806 the following appears:

"Its main features are that it is an extremely compact package which can be speedily moved from one site to another; has unusual maneuverability and hence can be set up at the well in a matter of minutes; and can be operated both expeditiously and effectively on a pulling job with a high degree of safety.***

"With the advent of deeper footage to service, and tighter highway regulations, Frank's finest engineering talent was sent into the field and after long consultations and observation with experienced oil company production technicians, designed the Clipper. It was designed primarily for servicing and workover operation and secondarily, but without sacrificing speed or safety, for over-the-road travel as a complete strung-up unit. All non-essentials were eliminated and the maximum in performance over the longest period with the highest safety factor obtainable provided.

"From the beginning of the development of the Clipper line Franks engineers kept in mind a

better approach to highway legality, through improved weight distribution.

“A singular advance in design was accomplished when provision was made so that the Clipper could be headed into a well location instead of backing in. This feature provides perfect ‘spotting’ or alignment over the well immediately, even on hillsides and tight locations. * * * ”

On Page 1804 the following advantages are listed:

“ * * * These are the Franks-pioneered self-propelled integrated units that head into the well location instead of backing in. Features:

“Latest approach to highway legality and perfect weight distribution.

“Easier spotting even in close quarters, hill-side locations and difficult terrain, as it heads into location instead of backing in.***

“Cab remote from engine and protected by main frame structure giving complete driver safety. * * * ”

“Stabilized for heaviest pulls with wide spread derrick outriggers. * * * ”

These advantages are summed up in the facts admitted to be true in the Pretrial Conference Order, Item III (12) by reference to Item 55 H-J and L and adopted as Findings of Fact (F #2 - O III 12 - PS 55 A - D & H - J and L, Record pp. 45-47).

Item 55:

“These ‘Clipper units’ all have the following characteristics also possessed by the structure described in the Moon patent: * * * (See Items A - D, H - L)

“H. The position of the hinge and the location of the derrick erecting mechanism is such that the mechanism transmits the erecting load to the chassis between the front axle and the rear axle.

“I. The load of the derrick as it is erected and moves towards its perpendicular position is transmitted to the chassis to the ground and produces a load distribution resulting in a chassis frame deflection which is well within the allowable strain in the structure.

“J. By positioning the engine at the rear of the vehicle and hinging the derrick at the front of the vehicle, the center of mass of the structure is moved towards the rear side of the center line of the vehicle, thus giving to the drive-in unit stability during raising and in use.***

“L. The arrangement with the motor at the rear of the truck and with the crown of the derrick to the rear of the truck and with the cab at the front of the truck has also the following advantages:

- (a) By placing the driver next to the base of the derrick, he can spot the derrick by driving directly to the desired location;
- (b) The arrangement of the parts makes it possible to limit the front leg extension to any desired amount in front of the vehicle by providing cooperating structure to carry the load to the ground;
- (c) Room is provided on the truck for the hoist and also room for positioning the erecting jack and room for its rotation to erect the derrick;

- (d) The arrangement provides room for positioning the major weight on the rear wheels and provides room for shifting the motor and hoist so as to place the right proportion of the weight on the rear and front wheels.”

D. APPELLEES' DRIVE-IN UNITS

The issues presented for trial and stipulated in the Pretrial Order specify the appellees' units as those shown in Appellees' 1956 catalog (Ex. 55) at page 1810 and in the 1957 catalog (Ex. 54) at pages 1883, 1884 and 1885. (The photographs of these units as they appear in the catalogs are reproduced on a reduced scale in the Appendix.)

The Court also found as a fact that the appellee's drive-in units were correctly shown at said pages and also correctly shown in Exhibits 57, 59, 93, 94 and 95 (F #10, Record p. 89).

Exhibit 59 is reproduced in the Book of Exhibits at page 773. Exhibits 57, 93, 94 and 95 are included as illustrations in the Appendix by photographic reduction.. Exhibits 54, 55, 57, 93, 94 and 95 were included in the Record by stipulation as physical exhibits.

Exhibit 57 is a reduced print of Frank's Drawing No. 100-075, Exhibit 56 (Woody Ex. 3; see list of Exhibits, Ex. 99, reproduced in the Appendix, and Record pp. 343, 345 and 348).

Exhibit 59 is a reduced print of Drawing No. 41-129 (Ex. 58) which was Exhibit 4 of the Woody deposition (see Ex. 99 and Record pp. 343, 345 and 348).

Mr. Woody stated that drawing 100-075 (Ex. 56) shows the unit shown on page 1883 of Exhibit 1 (now Ex. 55). (See Record p. 517). He also stated that drawing 41-129 (Ex. 4, now Ex. 58) was a drawing of the unit shown on page 1884 of Exhibit 1 (now Ex. 55). (Record pp. 517 & 589).

Mr. Woody testified that the hinge is supported on the chassis of the vehicle in Exhibit 56 (Woody Ex. 3) similarly as it is supported in Exhibit 58 (Woody Ex. 4) and that although the details vary, essentially it accomplishes the same thing (Record pp. 590 & 591).

In the following discussion we will refer to the numbered and lettered parts of the Exhibits 57, 59 77 and 95. The Exhibit 59 is in the Book of Exhibits, Vol. III, of the Record at p. 773. We are including a reproduction of Exhibits 57, 77 and 95 on a reduced scale in the Appendix.

1. The Construction of Appellees' Drive-In Unit

In this section of the brief we will discuss the construction of appellees' drive-in unit. In doing so we will analyze the "means" in the same order as we have used in discussing the specification of the patent in issue. We shall at a later place in the brief show that not only are the "means" the same, but the same results are obtained by the appellees' drive-in units as by the patented drive-in unit and in the same way. No recourse to the Doctrine of Equivalents is necessary to "read" the claims on the accused structures. Appellees' structure and the structure as illustrated in the drawings of the patent are not different in any substantial degree and act in the same manner to

produce the same results as the equivalent structures illustrated in the drawings of the patent in suit.

(a) The Chassis and Location of Engine and Winches

The chassis as is the case in the patent (Ex. 1) is formed of longitudinal frame members (1 on Ex. 57) and carries an engine at the rear of the chassis and a cab at the front of the chassis with the winches placed between the cab and the engine. In appellee's drive-in unit, shown in Exhibit 57, the front wheels are mounted on a bogie which is turned as a unit for purposes of steering the truck (Record pp. 527-531). While in the form shown on Exhibit 59, the front wheels are mounted in pairs on separate axles which are carried on the front bogie with the wheels steerable (Record pp. 589-590).

(b) The Driver's Position

The driver's position is in the cab at the front of the truck (Record pp. 533-534). The construction is such that the hinge support framework and the derrick structure and legs do not obstruct the view of the driver. This will be discussed below. At this point it is sufficient to refer to Exhibts 57 and 94 to show how the hinge supporting framework is designed to create a portal to give the clear view ahead (Record p. 542). That is a safety feature. (See Record pp. 615 & 616, and this Brief, p. 29).

(c) The Derrick and Derrick Hinge

The derrick is a telescopic derrick composed of an upper and a lower section (Record pp. 534-535). They are telescoped when at the rest position and may be extended when the derrick is in erect position. The

derrick is formed of a series of panels or bays (Record pp. 535-537). (See bay A between cross members 22 cross braced by 21 between the derrick leg members 19 and 20 on Ex. 57 in the Appendix).

The derrick employed is a conventional telescopic derrick modified by omitting the cross bracing between the front legs at the pedestal thereof (see letter A of Ex. 81, originally Woody Ex. 28, See Appendix). The following testimony by Mr. Woody states the relationship of the derrick legs to the driver's position:

“Q. We will mark this exhibit plaintiffs' Exhibit 28. Mr. Woody, in common with all of the derrick structures to which you have testified heretofore, is it true that they, as well as this, show an unbraced section between the front legs of the derrick, between the pedestal under the front legs there, a cross member which I will mark as A on Exhibit 28, is that correct?

“A. That is correct. In other words, you mean that there is a window there so that the legs can straddle.

“Q. Yes, and a person inside the cab can look straight through?

“A. They could, although it is to straddle the frame of the structure generally. This same derrick structure may be used on several units, and the clearance is necessary to straddle the frame. It is a construction we have used for years.” (Record pp. 594-595).

The derrick is mounted on the chassis by a frame-

work which carries the hinge members, formed of two split bearings 24A in which the bearing shaft 24, connected the leg members 20, is journaled with its axis at 26 (Record pp. 538-540). The truss 23 is carried on the chassis frame. The truss as shown on the front view of Exhibit 57 is composed of two acute triangles 23 and 23c whose bases are carried on the chassis and whose apexes carry the bearings (Record pp. 542-543). This forms a frame for the front window of the cab (Record p. 542). The cross bracing members 23E extend along the side of the cab at an angle from the derrick hinge to the chassis, shown on the side view of Exhibit 57, through which load is transferred to the chassis, as will be discussed more fully below (Record p. 544). This same structure is shown on Exhibits 93 and 94. A similar construction is employed in the form shown in Exhibit 59 (Record Vol. III, p. 773; see pp. 39, 43-46 of this Brief). In Ex. 59 the hinge is shown at 226. The hinge supporting truss is shown in side view at 226A. (Record p. 591). This structure is also shown on Exhibit 84 (Record Vol. III, p. 774) and on Exhibit AB (Record p. 990) although the angle from which the photograph is taken distorts the relative location of the truss members and the cab front window. See in this connection Exhibit 57 and Exhibit 94 (in Appendix) and the picture in the lower left view of p. 1812 of Exhibit 55 (Record pp. 566 & 567).

The hinge is positioned above the driver's head (Record p. 551-552). The back legs of the derrick, when the derrick is in rest position on the truck, are above his line of vision with one leg one side of the cab and the other on the other side of the cab (Record p. 552).

The hinge is positioned between the front end of the chassis and the front axle. In the form of Exhibit 59 the hinge 226 is ahead of the line 202A which is the vertical through the axle of the forwardmost wheels 202A of the bogie (Record pp. 589 & 592) and is rearward of the front of the chassis (Record p. 592). This is also incorporated in the form shown on page 1884 of Exhibit 54 (Record p. 593; see Appendix).

In the form shown in Exhibit 57, the hinge point 26 is behind the front of the chassis (Record p. 546) and in front of the axle 6 of the rear front wheel axles and ahead of the center line of rotation of the whole bogie unit, the wheels not being individually steerable (Record pp. 529-532). This construction is the same as that appearing on page 1883 of Exhibit 54 (Record p. 517).

Mr. Woody testified that the form shown on page 1885 of Exhibit 54 is also shown on Exhibit 60 (Record pp. 518 & 519; see Appendix). Referring to Exhibit 60, it will appear that the hinge is between the front of the chassis and the front axles.

The relation of the location of the cab and of the derrick hinge varied, as will be seen by reference to Exhibits 59 (see Record Vol. III, p. 773), 57, page 1810 of Exhibit 55, pages 1883, 1884 and 1885 of Exhibit 54; Exhibits 60, 62, 63, 65, 93, 94 and 95 in Appendix. We will discuss this matter more fully below.

(d) The Transverse Extent of the Derrick Legs and Hinge Supporting Structure

The derrick structure has four legs. The two legs which are the two top legs, when at rest on the truck, form the two front legs when the derrick is erected

ahead of the cab. The two bottom legs are made sectional, with a hinged section termed an outrigger, which extends from the hinge to the ground. They are omitted from the drawing of Exhibits 58 and 59 (see Record p. 560).

(i) The Outriggers

The outriggers are in the form of a collapsible truss connected to a jack which forms an extension of each of the rear legs when the derrick is erected. The truss is hinged to the chassis so that when the derrick is at rest on the truck, the outrigger may be folded back against the side of the cab.

Mr. Woody (Record p. 560-564) described these outriggers by reference to Exhibit 76 (which was Woody Ex. 24); a reduced print of this Exhibit is in evidence as Exhibit 77 (see Appendix). These outriggers are also shown in Exhibits 93, 94 and 95 (see Appendix) and appear in Exhibit 84 (Record p. 774 and AB Record p. 990).

The outrigger is composed of a jack connected by a truss to the chassis, the truss is composed of an angular member extending from a point on the hinge support framework adjacent the hinge point downward at an angle to the horizontal until it meets the outrigger jack marked 101 on Exhibit 77. A second truss member marked 104 on Exhibit 77 connects the jack 101 and hinge support frame where it is hinged at 102. This structure also appears on Exhibit AB, where it is seen as two tubular members which form a triangular structure joined to the jack at the apex. The outrigger jack is also braced to the chassis behind the cab by a brace 103 of Ex. 77, which is split so that

it can bend at a mid point. This appears on Exhibit 84 (Record Vol. III, p. 774) where it is seen as the two parallel members extending from the jack to the chassis frame rearward of the cab. The hinge is in the middle of the brace. The outrigger is thus hingedly mounted so that by collapsing the brace at its midway hinge, the outrigger may be folded back after the derrick is retracted and its load removed from the outrigger.

When the outrigger is in position, the brace members connecting the outrigger jack to the hinge supporting framework and to the chassis behind the cab form a truss which stabilizes the derrick (Record pp. 561-564).

We shall discuss below the function of the hinge supporting framework and the outriggers in cooperation with the legs as load carrying members.

(d) The Derrick Erecting Means

The derrick is erected by means of an extensible jack hinged at its lower end on the chassis behind the front wheel axles and behind the cab. The piston rod of the jack is hinged to the lower end of the derrick (see Ex. 57, 59, 93 and 95; Record pp. 571-573).

2. The Results obtained by the Appellees' Drive-In Unit and the Way these Results are obtained

We will first discuss the way in which the appellees' structure operates for the purpose of showing how this "way" is the same "way" as that employed by the patented structure. We will then discuss the results obtained to show that the same results obtained by appellants' patented structure.

(a) The "Way" Appellees' Structure Operates

(i) Over-the-Road Position and Spotting of the Derrick

In the roadable position the derrick is retracted and rests on the truck, with its top end at the rear of the truck. The derrick ends in extensible legs which are retracted for transportation on the road, and the legs are extended when the derrick is erected. They can be extended as far as needed (Record pp. 578-579).

In this position the driver has a clear view ahead due to the portal in the hinge supporting framework and to the positioning of the legs on each side of the driver's position so that nothing obstructs his view ahead. He may drive directly to the location and needs no aid to spot the derrick accurately (Record p. 613 & this Brief pp. 9, 12, 21 & 29).

(ii) The Erection of the Derrick

Mr. Woody described the operation (Record pp. 566-579). When the derrick is spotted, jacks normally carried folded under the chassis are placed under the chassis, one under and adjacent to the erecting jack hinge at the chassis (see jack 33 on Ex. 57 in Appendix; Record p. 569). The outriggers are placed in position and the outrigger jacks adjusted (Record p. 570). After the jacks are placed and tightened, the ram of the erecting jack is extended and the jack pivots on its hinge on the chassis and the derrick (Record p. 571).

The following balance of forces is obtained. Mr. Woody explained this by reference to Exhibit 57.

As the ram is extended and the derrick starts to lift off its support there is a vertical upward force exerted on the derrick hinge and on the derrick hinge support and a downward force at the hinge connection between

the erecting jack and the chassis (Record p. 572). The chassis between the erecting jack hinge and the front of the chassis is in bending (Record p. 576).

When the derrick approaches the vertical, the upward force on the derrick hinge changes to a downward force. This load is absorbed in the hinge supporting framework and transmitted to the chassis (Record p. 574). The downward thrust on the derrick hinge axis is also distributed to the outriggers (Record p. 577).

The derrick proceeds over center to its vertical position where it has some forward tilt when erected (Record p. 577). The front leg extensions are screwed down to place the front legs on the ground (Record p. 578). The derrick is then extended (Record p. 580). The balance of forces obtained in Appellees' Drive-In Derrick during erection is the same as obtained in the patented Drive-In derrick. The "way" Appellees erect their derrick is the same "way" as the patented derrick is erected.

(iii) Transference of Derrick Load to the Ground

The load on the derrick during operation is transmitted through the legs to the ground directly through the front legs and through the rear legs via the hinge supporting truss positioned in front of the driver, and via the angle brace member positioned alongside the cab and to the chassis and to the jack underneath the chassis adjacent the hinge. The load is also transmitted to the outrigger jack through the truss joining the outrigger jack to the hinge support frame and to the chassis. The load thus goes to the ground through the front and rear legs,

one pair on each side of the driver's position, and through the cooperating members (the hinge support framework and the outriggers), one set on each side of the driver's position.

Mr. Moon described the action of the structure shown on Exhibit 95 (see Appendix where the drawing is included on a reduced scale), found by the Court to correctly represent appellees' structure (F #10, Record p. 89).

Mr. Moon (Record pp. 277-281) drew a load diagram on Exhibit 95 illustrating the direction and magnitude of the various components of the load on the derrick. The direction of the load component is illustrated by an arrow and its relative magnitude by the length of the arrow. Thus L1 shows the magnitude and direction of the load on the derrick line, i.e., connected to the hook. The load introduced by the "fast line" load, i.e., the pull of the line running from the drum to the pulley at the top of the derrick to lift the block, is represented by the arrow L3. The guy line which is connected to the top of the derrick and to the end of the truck, which acts to help hold the mast erect, introduces a further force. The resultant of these forces is a force which in direction extends from the center of the pulley at the top of the derrick parallel to the angle of tilt of the derrick. Opposing the resultant of these forces is the reaction at the bottom of the legs at R1 which opposes the force down the front legs (see L4) and a reaction R2 opposing the downward force on the outrigger jack (see L8).

The forward tilt of the mast causes a horizontal force against the support at the bottom of the front

leg and at the derrick hinge. This force is resisted by an opposing reaction at R5 and R4 which balances these forces. These horizontal forces and vertical forces result in a force L6 which passes through the angular frame member between the derrick hinge supporting structure and the frame and which passes alongside the cab. This force results in a downward force against the chassis frame which is opposed by the reaction R3 where the load goes into the ground. Appellees Drive-In derrick thus transmits the derrick load to the ground in the same "way" as does the patented Drive-In derrick (Record pp. 277-281). Mr. Woody's analysis (Record pp. 582-588) confirms Mr. Moon's explanation.

The appellees' Clipper thus includes a derrick with two front and two rear legs erected adjacent the front end of the chassis, the legs of the derrick are spaced apart with respect to the chassis for a distance greater than the transverse extent of the driver's position. The legs of the derrick are positioned, a pair (front and back legs) on one side of the driver's position and a pair (front and back legs) on the other side of the driver's position. There are cooperating members which cooperate with the legs to carry the load to the ground on each side of the driver's position, these members being located on each side of the driver's position.

- (b) The Results Obtained by the Appellees' Structure
- (i) **The Appellees' Structure, like the Patented Structure, yields a Unit which is legal**

This results from the permissible distribution of the weight by the arrangement of the engine, winch and derrick (see this Brief, p. 28, and F #2 - O III

16 pp. 60-61, 12 - PS 55J, Record p. 46). By hinging of the derrick at the front of the chassis, the distance which the derrick protrudes ahead of the chassis could be limited to the desired amount.

(ii) Appellees' Structure, like the Patented Structure, yields a Stable Unit

The hinging of the erecting jack between the rear and front wheels and the hinging of the derrick on a hinge support adjacent the front of the derrick produces a balance of forces which yields a stable platform during erection and in use.

(iii) Appellees' Structure, like the Patented Structure, may be easily spotted

The provision of a derrick hinge support which carries the loads to the ground on each side of the driver, without parts which obstruct the driver's vision, provides a window through which the driver may see where he is going. By arranging the derrick so that it could be erected at the front of the vehicle and giving the driver a clear view ahead, the spotting of the derrick is greatly facilitated.

(iv) Appellees' Structure, like the Patented Structure, provides a Protective Framework for the Driver

This also permitted the use of the hinge support as a protective framework to provide for safety of the driver.

These results which appellees' drive-in unit had in common with the patented structure are admitted by appellees, and were found as a fact by the Court (F #12 O III 12 PS 55, Record pp. 45-47; F #12 O III 16, Record pp. 60-61).

III

THE QUESTION INVOLVED IN APPELLANTS' APPEAL

A. Do the claims "read" on appellees' drive-in unit in structure, function and results and thus infringed?

1. May the limitations of claim 1 with respect to the entrance of the driver's position into the free area between the rear legs be introduced into claims 2-5 where they do not appear.

B. Is recourse to the Doctrine of Equivalents necessary in determining whether or not appellees' structures infringe the patent in suit?

C. What is the range of equivalents to which the patent in suit is entitled?

D. Does the prior art so narrowly limit the permissible range of equivalents as to exclude appellees' structure?

E. Although no findings or conclusions were made by the Court below on the issue of file-wrapper estoppel, it was argued at the trial (Record pp. 498-507). The failure of the Court to find file wrapper estoppel is significant. This issue, however, presents the question as to whether the Court's judgment dismissing the complaint may be supported by such file wrapper estoppel as limiting the claims so as to make the appellees' device non-infringing.

This issue, then, presents the following questions:

(a) Are the claims so ambiguous as to require recourse to the file wrapper for their proper interpretation?

(b) Has the appellee the burden of proving the existence of a file wrapper estoppel to limit the claims to a scope such as to exclude the appellees' structures?

(c) Are the claims limited by amendments made to the claims so that in order that appellees' drive-in units infringe the claims, the claims must be expanded to include that which was abandoned by such amendments?

(d) If the claims 2-4 are so limited by these amendments, does claim 5 contain these limitations?

(e) If the claims are limited by amendment so that they define a drive-in portable derrick different from Appellees' Drive-In portable derrick, is this difference such but that by a proper application of the Doctrine of Equivalents, the appellees' structures infringe such claim or claims?

IV

SPECIFICATION OF ERRORS

A. THE COURT ERRED (Record p. 90)

1. The Court erred in finding that the appellees' drive-in units do not infringe the claims of the patent in suit.

2. The Court erred in concluding that in view of the state of the prior art the scope of the invention should be closely limited and so that the claims are entitled to a very narrow range of equivalents and the said range of equivalents does not include the accused devices of appellees.

3. The Court erred in concluding that none of the claims of the patent in suit are infringed by the drive-in units of appellees.

4. The Court erred in concluding that the appellants are not entitled to carry the effective filing date of the patent in suit to February 24, 1948, the filing date of application Serial No. 10,412 (Ex. 46).

5. The Court erred in its judgment that (a) none of the claims of the patent in suit have been infringed by appellees, (b) dismissing the complaint and (c) denying relief to appellants.

Point No. 4, in that it relates to the issue of validity, is not discussed in this brief, since no issue of validity arises upon appellants' appeal and is material only in the event Defendant-Cross Appellants urge their appeal on the issue of validity. We will reserve discussion of this point.

V

ARGUMENT

A. SUMMARY OF ARGUMENT

We have shown in the previous portion of the brief that the appellees' structure and the patented structure in their manner of operation, the results accomplished, and in the means by which the results are obtained, are identical. The difference, and the only difference, between the appellees' accused device and that illustrated in the drawings of the patent lies in this: That in appellees' device the cab is moved to the rear of the chassis a few inches, and in that the lower portion of the rear legs are spread apart by the use of outriggers and do not come straight down as in the illustration shown in the figures of the patent. In all other essential respects, the structures are identical.

These differences do not change the results obtained or the way these results are obtained.

The description of the invention in the specification does not limit the invention to the precise form of the invention illustrated in the drawings of the patent, and the claims 2-5 clearly and unambiguously include the accused drive-in units.

The Trial Court was clearly wrong in its finding of non-infringement and clearly wrong in its conclusion of law that: "In view of the prior art the scope of the invention should be closely limited and so that the claims are entitled to a very narrow range of equivalents and said range of equivalents does not include the accused devices of defendants." There is no evidence in this cause which would support such

a conclusion. The appellees have never made any such contention, and it was not an issue specifically included in the Pretrial Order among the issues to be tried. Even a casual reference to the prior art in evidence will show that none of the art having a date prior to the date of the invention shows a portable telescopic four-legged derrick hingedly mounted at the front of the chassis where is also the driver's position, with the hinge being above the driver's position. Certainly the accused drive-in unit is as remote from the prior art as is the patented drive-in unit.

With regard to the interpretation of the claims, it is the position of the appellants:

That the appellees' drive-in units differ in form in immaterial details from the structure shown in the drawings of the patent, and that the form shown in the drawings of the patent is not a matter of substance to which the claims are limited;

That the claims of the patent read upon the structure of the appellees in terms, function and results. Recourse to the Doctrine of Equivalents is unnecessary;

That the prior art does not disclose any drive-in unit having the structure or function which gives the results of the patented and appellees' drive-in units. The Trial Court was clearly wrong in concluding that the prior art limited the claims so that appellees' drive-in units were outside the range of equivalents to which the patent was entitled;

That the history of the prosecution as evidenced by the file wrapper do not restrict the claims to forms of Drive-In Units which do not include Appellees' Drive-In derricks;

That even if the claims of the patent be restricted, as was contended by appellees at the trial, contrary to the wording of claims 2-5, by reason of file wrapper estoppel, to a structure in which the legs straddle the cab in the sense that the cab is in the space between the rear legs of the derrick, the appellees' drive-in derricks are the equivalent thereof and the claims must be interpreted, to embrace this equivalent. In so doing the appellants are not expanding the claims as allowed to be the claims as rejected.

It is to be noted that there is no dispute in the evidence made as to the nature of appellees' structure. The admissions made in the pretrial order have established the accused structure. The prior art is in evidence and there is no dispute in the record as to the showing in the prior art except in the case of the advertisements (Exhibits M-R) which are not part of the prior art on the issue of infringement.

In such case the finding of fact of infringement is not one of those findings of fact which may not be disturbed unless clearly erroneous. The question of infringement in this case is a question of law and involves the resolution of the following legal issues:

Did the Court apply the Doctrine of Equivalents correctly?

Did the Court apply the proper rules of construction of the claims in finding non-infringement?

See:

Kemart Corp. v. Printing Arts Research Laboratories (9th C.C.A. 1953), 201 F.2d 624 at p. 627, and cases therein cited under Note 5 (quoted in Appendix).

B. THE CLAIMS 2-5 COVER APPELLEE'S DRIVE-IN UNITS IN WHICH THE LEGS AND THE DERRICK HINGE ARE SO LOCATED THAT TWO LEGS OF THE DERRICK LEGS ARE ON ONE SIDE OF THE DRIVER'S POSITION AND TWO ARE ON THE OTHER SIDE OF THE DRIVER'S POSITION WITH THE HINGE POSITIONED ABOVE THE DRIVER'S POSITION

Claims 2-5 read on appellees' drive-in units in structure, function and results. The claims recite the chassis, telescopic lattice derrick, the driver's position adjacent the front end of the chassis, the erecting mechanism hingedly mounted on the chassis between the front and rear wheels, and also at lower end of the derrick. Claim 3 and 4 also claim the position of the motive power unit (see Ex. 1A, Record pp. 649-656; claim 2, items A to F, H and I; claim 3, items A to G, I and J; claim 4, items A to H, J to L (a) claim 5, items A to G and I). It is understood that there is no dispute but that appellees' drive-in units embody each of the above elements of said claims. The previous discussion (see pp. 34-47 of this Brief) shows that not only does the evidence establish that these elements are so embodied in the appellees' structures but also that the findings of the Court include an admission by the appellees that these elements are all embodied in appellees' structure (see pp. 23, 32-34 & 46 of this Brief).

1. The Location of the Hinge with Respect to the Driver's Position

It is the position of appellants that both in appellees' structure and in the patented structure, the derrick hinge is above the driver's position.

The claims 2-5 state that the hinge is “above” the driver’s position.

The word “above” means at a higher elevation and is of broader connotation than “immediately above” (see Webster’s Unabridged Dictionary). The clause in the claims that the hinge is positioned “above the driver’s position” means thus that it is at an elevation higher than the driver’s position.

The word “above” does by itself not locate the hinge with respect to its position with respect to the front or rear end of the chassis, i.e., its longitudinal axis, or the driver’s position. The position of the hinge with respect to its location along the longitudinal axis is defined in the following claims as follows:

(1) In claims 2 and 3, so as to place the hinge to be intermediate the front axle and the front of the chassis.

(2) In claim 4 and 5, so as to place the hinge adjacent the front axle.

2. The Elevation of the Hinge

The location of the hinge with respect to its elevation is for the purpose of positioning the legs of the derrick, when it is at rest on the truck, so that they are above the cab and above the winch and rear engine (see claim 4, item G (a) and Ex. 1, Fig. 1) and to assure that the derrick does not obstruct the vision of the driver.

The function served by such location is stated in the patent as follows:

“Because of the fact that the cab is positioned adjacent the front wheels where also the derrick is provided, the driver has an unobstructed view of

the location where the derrick is to be erected.” (Ex. 1, col. 2, line 39). And further:

“The truck may be driven into the derrick site. It will be observed that the driver has full view of the site and can spot his truck accurately. It will be observed that no equipment associated with the truck is positioned in front of the driver. Particularly, as will be seen, the derrick legs straddle the cab, and the derrick, while it is being erected or retracted to rest position, does not obstruct the view of the operation of the cab.” (Ex. 1 col. 4, lines 18 through 26).

The location of the hinge with respect to its position along the longitudinal axis of the chassis i.e., with respect to the location of the driver's position along this axis, is for the purpose of positioning the derrick at the front end of the truck and to provide a hinge supporting framework which cooperates with the legs to carry the loads to the ground, acting also as a framework which protects the driver and places him close to the derrick and gives him clear vision.

The patent states:

“The driver in his cab position, where he has, as is conventional in trucks, all of the steering and driving controls, can see the derrick moving into position at all times and thus may, if he so desires, readjust his position with great facility. Because of the fact that the cab is positioned adjacent the front wheels, where also the derrick is provided, the driver has an unobstructed view of the location where the derrick is to be erected. The improved visibility imparts a surer control by the driver who is in control of the lifting mechanism.” (Ex. 1, col. 2, lines 31 through 42).

3. The Location of the Derrick Legs with Respect to the Driver's Position

(a) The Location of the Derrick Legs in Claims 2-4

The location of the legs is thus referenced to their position at the front end of the chassis when erected and to the unobstructed view available to the driver.

Nowhere in the specification is any statement made that the invention is limited to any specific location of the hinge to be "immediately above" the driver's position or that it is limited to the location of the legs as shown in the drawings of the patent, to place the cab so that it protrudes into the area bounded by the lower ends of the four legs. The figures illustrate such a construction but the specification does not so limit the invention.

(i) The ordinary meaning of the word "straddle" as used in claims 2-4 is that two of the legs are on one side of the driver and two on the other side of the driver

The ordinary meaning of the terms employed in the claims as well as the meaning implicit in the description in the specification confirms the fact that the appellees' structures embody the inventions defined by the claims of the patent.

The word "straddle," according to Webster's Unabridged Dictionary, has as one meaning, "To part the legs wide; to stand, sit or walk, with legs wide apart, esp. to sit astride. to bestride; of the legs to spread apart."

It is to be observed that the term "straddle" in claims 2 and 4 is referenced to the front two legs of

the derrick as well as to the rear two legs of the derrick. Thus the claims state that the front two legs straddle the driver's position as well as do the rear two legs. The sense of this use of word "straddle" must be that the legs are spaced apart so that one rear and one front leg is to one side of the driver's position and the other front leg and the other rear leg to the other side of the driver's position.

The language of claims 3 and 4 differs from that of claim 2, in that claim 2 adds to the description of the location of the driver's position with respect to the four legs of the derrick, the specification that the driver's position is located between the four leg portions which are positioned in load transference relation to the ground (Ex. 1, claim 2, J and K and K (a)).

Webster's Unabridged Dictionary defines "between" as "In the space which separates; betwixt; as New York is between Boston and Philadelphia." In this sense the driver's position in appellees' drive-in unit and in the patented unit is between the front legs as well as the rear legs.

(b) The Location of the Derrick Legs in Claim 5

(i) Claim 5 does not contain the statement that the legs straddle the driver's position

It includes any construction in which the legs of the derrick are positioned adjacent the front end of the chassis (Item I, claim 5, Ex 5, Ex. 1A), where the legs are placed in transference relation to the ground with the aid of cooperating members, the legs being located so that one pair of front and rear legs and cooperating means are **to one side** of the driver's

position and the other pair of front and rear legs and their cooperating members are **to the other side** of the driver's position, so that their spread is wider than the cab (see Item J (a) (2), claim 5, Ex. 1A).

The claim thus locates the legs with respect to the transverse extent of the driver's position, i.e., to each side thereof. As to their position fore and aft, the claim merely requires that the derrick be positioned adjacent the front of the chassis (Item 1, claim 5, Ex. 1A).

C. APPLICATION OF CLAIMS TO APPELLEE'S DRIVE-IN UNITS

1. The Accused Structure differs from the Structure as illustrated in the Drawings of the Patent in immaterial Detail, but employs all of the Features of the Invention as described in the Specification

The appellees' structure is identical with the patented structure as illustrated in the drawing, except that the cab is moved a little towards the rear of the truck and the rear legs reach the ground in part through leg extensions which stand spread apart instead of going straight down. The chassis, engine and winch arrangement is the same. The hinge framework is the same. The supporting jacks are the same. The four legs are the same. The outriggers cooperating with the hinge supporting framework act in the same way and are structurally the same as the lower ends of the rear legs and the hinge supporting framework and the jacks in the patented structure. In fact, this is admitted by appellees and found as a fact by the Court. This was discussed at pp. 33-46 of this Brief.

Recourse to the Doctrine of Equivalents is not necessary to “read” the claims 2-5 in structure, function and result on the accused device. They read directly thereon.

The application of Items A through I of claims 2 through 5, and J and K of claim 4 (see Ex. 1A, Record Vol. III, pp. 649-656) is obvious and it is understood that there is no dispute but that the appellee’s structure embodies these elements. In fact it is admitted (see this Brief, pp. 32-33).

In the following discussion we will refer to certain Exhibits included in Volume III of the Record and to others included as physical exhibits by stipulation and reproduced, some on reduced scale, in the Appendix to this Brief.

2. Applying Claim 2 to the Appellees’ Structure

(a) Applying Item J of Claim 2 (Ex. 1A, Record p. 650)

The portions which are in load transference relation to the ground (see Appendix, Ex. 93 to 95; Ex. 57; p. 1812 of Ex. 55; Ex. 77 and 84; Record p. 774; and Ex. AB, Record p. 990) include in addition to the front legs L4 of Exhibit 95 (corresponding to 19 of Ex. 57), the cooperating members which act as leg extensions to the rear legs of L5 of Exhibit 95 (corresponding to rear legs of Ex. 57). The hinge supporting framework is composed of the upright members 23D (Ex. 57) and the diagonal members 23E (Ex. 57) extending from the derrick hinge to the chassis, both together forming the structure marked 23, both on Exhibit 57 and Exhibit 77 (see L8 of Ex. 95). These structural members, in cooperation with

the outrigger structure formed of the members 103 104, 105 and the jacks 101 (see Ex 77, 93 and 94), act as leg extensions to transfer the derrick load to the ground (see pp. 40-41, 43-44 of this Brief). Two like structures appear, one on each side of the cab, and they are separated, as will appear from Exhibits 57 and 77, at a distance greater than the transverse extent of the cab.

(b) Applying Item K of Claim 2 (Ex. 1A, Record p. 650)

The cab is positioned between the structures described in Item J and which are, as stated, one on each side of the cab.

The leg portions which straddle the drivers position are the framing members 23D and 23E, which with the four legs, including the outriggers, form the load supporting structure of the derrick, as described in connection with Item J of claim 2. The hinge is located intermediate the front end of the chassis and the front axle (see this Brief, pp. 38-39).

3. Applying Claim 3

(a) Applying Item J of Claim 3 (Ex. 1A, Record p. 652)

The application of Items J, J(a) is obvious and is not understood to be in dispute (see pp. 61-62 of this Brief). Element J (c) specifies that portions of the legs of the derrick which rest on the ground are spaced apart at a greater distance than the width of the front portion of the chassis. Appellees' structures possess this characteristic, as will appear from our previous discussion. (See discussion under Item J of claim 2).

(b) Applying Item K of Claim 3 (Ex. 1A, Record p. 652)

Item K specifies that there are leg portions which rest on the ground below the front part of the chassis. The appellees' outrigger jacks 101 and the front legs supply this structure and function.

Item K(a), state that the leg portions which are below the chassis straddle the driver's position. The front legs rest on the ground below the front end of the chassis. The outrigger structure, which rests on the ground, is composed of the truss (see Ex. 77) formed of member 104, 105 and 106 which are connected to the outrigger are also connected at both sides of the cab to the chassis frame; the diagonal 103 is connected to the chassis rearward of the cab. See Ex. 95, 81 and 83). (See Item J of claim 2).

It is clear that the leg portions which rest on the ground below the front end of the chassis form a structure which embraces the cab and straddle the cab.

4. Applying Claim 4

(a) Applying Item L of Claim 4 (Ex. 1A, Record p. 654)

The four derrick legs are spaced apart for a distance greater than the transverse extent of the driver's position (Item L(a)) and the legs and hinge are located (Item L(b)) so that the driver's position is between the four derrick legs, i.e., between the front two as well as the rear two. These leg portions extend from the hinge to the ground, the rear two through the hinge supporting framework and the

outriggers (see discussion under Items J and K of claim 2, and Items J and K of claim 3).

5. Applying Claim 5 (Ex. 1-A, Record p. 655)

(a) Applying Item J of Claim 5

This item is stated as follows: ‘means cooperating with the lower ends of said derrick legs to place said legs in load transference relation to the ground with said derrick in erect position.’”

These cooperating means are composed of the truss arrangement composing the outriggers, to wit, the jacks 101; the trusses formed of members 104, 105 and 106 of Exhibit 77, the diagonal brace L6 of Exhibit 95, shown as 23(E) on Exhibit 57, and the diagonal 103, are all connected to the chassis. They form the extensions of Legs L5. These structural elements act together to provide the means which cooperate “with the lower ends of said derrick legs to place said legs in load transference relation to the ground with said derrick in erect position.” There is one such structure on each side of the driver’s position (see Brief, pp. 36-41). (See discussion under claims 2, 3 and 4 above and this Brief, pp. 61-65).

(b) Applying Items J(a)1 of Claim 5

These structures, one on each side of the cab, are spaced apart transversely for a distance greater than the cab width, and thus conform with Item J(a)1.

(c) Applying Item J(a)2 of Claim 5

The lower ends of the legs and the structures which are described above which cooperate with the legs are located so as to position “one pair of front and rear

legs and their respective cooperating means to one side of said driver's position and the lower ends of the other pair of front and rear legs, and their respective cooperating means to the other side of said driver's position with the derrick in said erect position." (See discussion of Item J, Claim 2, pp. 62-63 of this Brief).

(d) Claim 5, like Claims 2-4, reads directly on the
Appellees' Units in Structure and Function

We have shown at pages 62-66 of this Brief that claims 2-4 read directly on the appellees' drive-in units. It is to be noted that claim 5, unlike claims 1 to 4, inclusive, does not contain the phraseology that the legs of the derrick "straddle" the driver's position or similar language.

If the term "straddle" is to be defined so as to require that the driver's position be within the space between the rear legs, such construction cannot be imparted to the language of claim 5, which states that the members cooperating with the legs to "place said legs in load transference relation to the ground" are positioned to each side of the driver's position.

Claim 5 is unambiguous and each element of the claim is found in the appellees' structure where it performs the functions of the elements as claimed.

It is significant that in claims 2 to 5 the language of the claims specifies a derrick with four legs and where the term "straddles" is used it refers to the leg portions of all of the four legs. Compare this statement with claim 1 in which the last clause states that the **rear** legs straddle the driver's position. Note also that in the drawings of the patent the cab is shown as positioned within the space between the **rear** legs and not in the space between the **front** legs.

D. THE PRIOR ART DOES NOT LIMIT THE CLAIMS SO THAT THE APPELLEES' STRUCTURE IS OUTSIDE OF THE RANGE OF EQUIVALENTS TO WHICH THE CLAIMS ARE ENTITLED

The conclusions of the Court (Record p. 90) that the prior art so limits the claims as to place appellees' drive-in units outside of the range of equivalents to which the claims are entitled, is clearly in error and finds no support in the evidence.

Reference to the Pretrial Conference Order makes clear that no such issue of law was to be litigated in the trial unless it be held to be included within the general issue of infringement. (O VIII, Record pp. 62 & 63).

The prior art was never relied on by the appellees below to show that their structure was that of the prior art. Reference to the Pretrial Order (O VI, Record p. 62) and to the appellees' Pretrial Opening Statement (Record pp. 49-56) will show that no such fact issue was presented.

The prior art in evidence in this cause consists of the following items:

Item: Evidence such as Exhibts 10-15 (see Ex. 10, Record p. 657; Ex. 11, Record p. 667; Ex. 12, Record p. 673) of the old back-in devices.

Item: The patents of Exhibit S (Record pp. 779 to 896) introduced on the issue of validity (see this Brief pp. 5 & 6). The Evans patent (Ex. S), either as a patent or a publication, has an effective date later than the admitted and found date of the invention. There was no evidence in this case that this English invention was either known or used in this country

prior to Moon's invention and no issue of such prior knowledge was included in the issues to be tried and no evidence was introduced on this issue at the trial.

Item: The patents of Exhibit T and T-1 introduced for the limited purpose of aiding the interpretation of the file wrapper (see this Brief, pp. 4 & 5, and Record pp. 300-303; 362-364).

Item: Certain advertisements of Waldrip (Ex. M-R) all of a date later than the admitted date of Moon's invention December 12, 1946, and thus are not prior art against the patent on the issue of infringement to limit the scope of the claims (see this Brief, p. 4; Record p. 494). These are admissible only on the issue of anticipation, i.e., the issue of validity, under Sec. 102(b) and as to this the Court found that they did not disclose the invention and held the claims valid. Being of an effective date later than the date of the invention, they are not competent evidence as to the state of the prior art for the purpose of the issue of infringement or for any purpose in connection with the construction of claims.

Dunbar v. Myers, 94 U.S. 187 at pp. 198-199; 24 L.Ed. 34.

Spengler Core Drilling Co. v. Spencer (D.C.S.D. Cal. S.D.), 10 F.2d 579 at p. 583.

Walker on Patents (Deller's Edition) p. 1240.

1. The Prior Art Back-In Units

This art was before the Court (See Ex. 10, 11 and 12). The Court received evidence in Court and by deposition and admissions.

The Trial Court found that the invention described in the patent was an inventive advance over the prior art (Finding #9, Record p. 89).

Nothing in this art can limit the claims to exclude appellees' accused drive-in units.

2. The Pleaded Patented Prior Art

(a) The Prior Art of Exhibit S

(i) The so-called "best patents"

While appellees in their book of patents, Exhibit S, have included a number of patents, they have selected but three as being the best (see this Brief, p. 4, and Record pp. 128 & 368).

Obviously, if these patents are the best representation of the prior art, the remainder are unimportant upon the issue of the limitation of claims by the prior art. If these three patents be not sufficient to establish the metes and bounds of the claims to exclude appellees' drive-in units, the patents with inferior disclosure would certainly not be of consequence.

The Morton Patent 966,346, patented August 2, 1910 (Record p. 781).

The patent states the apparatus is a portable fire fighting apparatus which "may be drawn by horses or otherwise propelled." (Morton patent, p. 1, lines 20-25). It consists (see Figs. 2, 4, 10 & 24) of a ladder hinged at 47 at the front of the vehicle (see Figs. 2, 4 & 10). The driver's seat is at 400 (see Fig. 2) at the front end of the vehicle, and above the tower when the tower is in retracted position on the ve-

hicle (see Figs. 1 & 2 and p. 9, lines 57-64). The tower is hinged on the front of the vehicle on a hinge which is mounted on the body of the chassis below the driver's position so that it could be laid down on the bed of the wagon or moved to a vertical position (see Fig. 4, 10 & 24, and p. 2, lines 60-80). The structure is positioned either alongside a curbing, as in Fig. 11, or is backed against the curbing as in Fig 10 (see p. 9, lines 18-21). This patent does not disclose a drive-in portable four-legged telescopic derrick hingedly mounted above the driver's position such that the derrick may be erected with its four legs in load transference relation with the ground and such that two legs and their cooperating members are on one side of the driver's position and two legs and their cooperating members are on the other side of the driver's position. In fact, this patent is entirely unrelated to the art of portable oil well drilling and servicing units.

The Trial Court having heard witnesses called by appellees (Record pp. 407-411) and by appellants (Record pp. 473-477) held that the claims of the patent were for an inventive advance over the prior art which included the Morton patent.

The Evans Patent 2,488,180, patented November 15, 1949 (Record p. 880).

It should be noted that the date of the Evans patent is November 15, 1949, and thus is later than the date of invention, December 12, 1946, and thus the Evans patent does not form part of the prior art for the purpose of limiting the scope of the patented invention (see this Brief, pp. 5, 6 & 68).

The Evans patent relates to a portable crane or lift truck to be employed in industrial establishments "for lifting heavy objects and packages for transfer from one place to another, for loading and unloading vehicles and for transferring goods and materials from one level to another" (Col. 1, lines 7-11).

The Evans patent describes a crane jib detachably bolted to the front of the chassis of the tractor (see Fig. 1 and Col. 2, lines 1-6). The driver sits at 14 near the rear of the tractor (see Col. 3, lines 21-29). The crane is not pivotally mounted and cannot be laid down to be carried in horizontal position above the driver. Fig. 10 shows an adaptation of the tractor to a fork lift type of load carrying device called "a platform hoist or stacker" (see Fig. 10 and col. 7, lines 69 et seq.). The crane is replaced by two upright members 110 bolted to the chassis in the same manner as the jib crane of Fig. 1 (see Fig 10 and col. 7, lines 69-73). A horizontal platform 111 is mounted to move up and down the frame members 110 by means of a cable 115 passing over a pulley 116 and connected to a "winding drum" 35 positioned beneath the steering wheel 16 (see Fig. 10 and col. 7, line 74 through col. 8, line 11). The framework 110 is hinged at 119 so that its upper portion can be laid down manually to rest on a "light frame 120" so that the unit may be moved "through arches and doorways." (Col. 8, lines 14-22) (Record pp. 479-480).

Mr. Bayliss testified that the Evans unit was designed for a function entirely different from oil well servicing operations and could not be used without completely changing its character (Record p. 481).

The Downie Patent 1,096,022, patented May 12, 1914 (Record p. 803).

The Downie patent relates to a modification of the portable cable tool unit which cause a drilling bit to be reciprocated in a bore hole by reciprocation of a rope on which the tool is suspended. This is done by passing the rope over a pulley positioned at the top of a mast and causing the rope to be pulled up and down by some power unit. The proper functioning of such devices depends on the elasticity of the rope which imparts the desired action to the drill. (See the general description of such devices given by Downie, p. 1, lines 30-63). Downie's structure is a modification of these devices whereby he may use a wire rope of substantially no elasticity by introducing elasticity by way of springs in the machine so that all parts of the machine subject to the action of the rope are yielding rather than rigidly connected (see page 1, lines 65-84).

The machine is composed of the engine, the winches, the walking beam and the mast for carrying the rope pully which are mounted on a wagon (see Fig. 1). There is no driver's position and no room for one. The wagon is not self-propelled, the engine 7 operating the winding drums 42 (page 2, lines 110-115). and does not drive the wagon (page 2, line 30). (Record p. 478).

The mast 13 employed is a two-legged structure of two posts 9 (see Figs. 1, 4 and 6) hinged at 12. When erect, the derrick is braced by a brace 14 (see Figs. 1 & 4) which extends from the top of the mast to the rear of the vehicle (page 2, lines 39-52).

(ii) The Second Best Patents

The remaining patents included in appellees' Exhibit S were not explained to the Court. They are presumably considered by appellees as less pertinent. They appear to add nothing to the prior art discussed above. Since, however, they are in the record, we feel that the following comments will be sufficient to show that appellees are right to consider them to be of little materiality as to any issue in this cause.

1,897,383 *G. W. Burgoyne, patented Feb. 14, 1933 (Record p. 842)*. A small boom located on the front of a conventional truck for handling light material loads (see Fig. 1). The boom 13 is hinged at the front of the chassis below the driver's position.

1,894,432 *G. R. Watson, patented Jan. 17, 1933 (Record p. 834)*. A tractor mounted cable to drilling machine (Fig. 1) with a mast 14. The description is not clear as to whether the machine is pulled or pushed into location as no track drive is shown and no operator's position is shown. The patent does not state that the mast 14 is hinged on the vehicle and on the contrary this suggestion is negated by the statement that the mast is braced (see page 2, lines 26 to 39 and the mast bracing shown in Fig. 1).

1,395,895 *A. M. Bellony, patented Nov. 1, 1921 (Record p. 815)*. This is a horse-drawn pile driving machine (see Fig. 1). It is designed to be pulled by horses (see Fig. 2). The seat 190 (Fig. 1, p. 6, line 129) is at the opposite end (tongue end) to the mast hinge. Driver faces horses with his back to the mast hinge. It is thus of the back-in type.

1,594,909 *R. P. Steele et al, patented Aug. 3, 1926*

(*Record* p. 831). A well pulling machine in which the mast is not hingedly connected to the tractor. To employ the tractor it is positioned against the brackets 16 and is bolted to the mast by bracket members 16 and bolt 19 to make a rigid connection between the mast and the tractor (page 1, lines 74-97). The driver (see steering wheels adjacent the rear wheels, Fig. 2), sits behind the engine 4 and hoist 7.

2,151,057 *J. Suth*, patented Mar. 21, 1939 (*Record* p. 843). This patent discloses a truck mounted back-in type non-telescopic fixed height derrick (see Fig. 1).

2,204,713 *C. White, Jr.*, patented June 18, 1940 (*Record* p. 658). This is also Exhibit 10. It shows a truck mounted back-in type portable derrick—cited in the specification of the patent in suit.

2,215,920 *H. H. Franks*, patented Sept. 24, 1940 (*Record* p. 854), shows a tractor 3 at the rear end of which a foldable derrick is mounted (see Fig. 1). It is thus of the back-in type.

2,276,224 *H. W. Cardwell*, patented Mar. 10, 1942 (*Record* p. 860). A self-propelled well servicing machine of the back-in type employing a pole mast (see Fig. 4).

2,343,517 *E. L. Alexander et al*, patented March 7, 1944 (*Record* p. 872). A back-in type core drilling rig mounted on a conventional truck (see Fig. 1). The tower is at 8 and the driver is at the other end. Nothing is said in the specification of the patent as to whether the derrick is hinged to the truck.

3. The Prior Art of Exhibit T-1 Cited by the Examiner

2,331,558 *McEwen*, patented Oct. 12, 1943 (*Record* p. 898), is a back-in truck and trailer mounted ser-

ving rig. The truck having separate motive power and trailer 2 is of the conventional design. The trailer carries an engine 4 and draw works 5 (pages 21-29). The telescopic derrick is mounted on the rear of the truck on hinge 17 (see Fig. 1).

2,175,381 *Dow*, patented Oct. 10, 1939 (*Record* p. 907), shows a conventional truck carrying a platform 26 which can be raised and lowered (see Fig. 1 and p. 2, column 1, lines 16-19).

2,204,716 *Woody*, patented June 18, 1940 (*Record* p. 668). This is Exhibit 11 and is the conventional back-in unit discussed previously in this Brief.

2,471,735 *Fleischman*, patented May 31, 1949 (*Record* p. 912), shows a semi-trailer carrying a concrete mixer.

2,251,013 *Donley et al*, patented July 29, 1941 (*Record* p. 916), shows a machine for setting telephone posts. The auger 153 and mast 146 are mounted at the front of the chassis. They can be laid down alongside the side of the cab which is offset to the side (see Figs. 1, 2, 3, 4 and 19).

The connection between the mast and the chassis is not clearly stated and although the specification states that the mast and boring head may be "folded down into substantially horizontal position at one side of the cab" (see p. 2, column 1, lines 39 to 46, p. 3, lines 28-31), the specification does not state that the mast and boring head are hinged to the vehicle. In fact it does state that the boring head 140 (see Figs. 1 and 2) is connected to the forward casing 142 (see Fig. 5 near top of page) of the boring unit 136 (see Fig. 5

and shown dotted and unnumbered on Fig. 4). The boring unit 136 is rigidly connected to the frame of the vehicle (p. 4, column 2, lines 59-69). It is to be noted that such rigid connection is necessary since nothing else holds the mast 146 erect to support the load (see Fig. 3 and page 4, column 2, lines 69-73). Presumably the boring head and the mast are unbolted from the boring unit to be laid down alongside the cab. However, if the undisclosed hinge is read into the Donley patent, the hinge necessarily would be below the driver's position and the mast erected to one side of the driver.

414,578 *Preston*, patented Nov. 5, 1889 (*Record* p. 940), shows a horse-drawn fire wagon, carrying an extensible ladder hinged at f' (see Figs. 1 and 9) to the turntable C below the driver's position (see R, Fig. 1). This patent is similar to the Morton patent discussed above.

379,424 *Steck*, patented Mar. 13, 1888 (*Record* p. 953), shows a horse-drawn fire wagon. The ladder is hinged at the front with the driver's seat above the ladder and hinge (see Fig. 1). This patent is in this regard similar to Morton and Preston.

443,096 *Kim*, patented Dec. 23, 1890 (*Record* p. 957), shows a horse-drawn fire wagon on which is positioned a ladder hingedly mounted at the front of the wagon (see C and L of Fig. 1) below the driver's position which is on the seat F (see Fig. 1).

855,771 *Haines*. Not in evidence book. It is understood of appellants that it was not included in Exhibit T-1.

2,496,706 *Fiedler*, patented Apr. 6, 1943 (*Record* p. 975), shows pile driver tower pulled into position by wire line 36. Steerable wheels are provided at front of the platform. Operator's position may be provided at 15—at extreme back end (see column 3, lines 18-32).

2,406,620 *Luckett*, patented Aug. 27, 1946 (*Record* p. 971), shows a truck mounted load carrier utilizing the dump body to handle the boom. The truck is a conventional truck and the boom is mounted on the front bumper at 15 (see Figs. 1 and 2, page 1, column 2, lines 13-17).

2,315,942 *Deist*, patented Apr. 6, 1943 (*Record* p. 975). This patent relates to a luffing crane with means for swinging the boom and for elevating or lowering a boom within limits. The crane is certainly not a highway vehicle—no operator or operator's position is shown. It is more like one-half of a drawbridge on tracks. The boom adjusting means is completely at the rear of the machine and is so designed that it could not lay the boom down for "over the highway" travel.

2,335,172 *Cornett*, patented Nov. 23, 1943 (*Record* p. 983). This is a patent of a concrete breaking machine with mast hinged at the rear of the chassis at 41 (see Fig. 5, page 2, column 1, lines 1-7), between the rear wheels 15 and 16 (page 1, column 2, lines 12-15). The operator sits at 90 adjacent the rear end of the vehicle (page 3, column 1, lines 8-15). The vehicle thus backs down the road breaking the concrete behind it. The hammer and its supporting assembly may be laid down alongside the driver. Fig. 8 shows another form showing a conventional truck with engine in front and cab behind the engine with the hammer hinged at the rear.

4. In none of the prior art is there shown a portable derrick suitable for servicing oil wells including a telescopic four-legged derrick hinged at the front of the chassis where the driver is also positioned and with the hinge located above the driver's position.

It is submitted that nothing appears in the prior art to limit the invention disclosed in the Moon patent to a structure where the hinge is located rearward of the front of the chassis for a distance equal to the location of the driver. Nothing in the prior art limits the invention to a structure in which the driver's position is in the area between the two rear legs of the structure. Nothing in this art would exclude from the ambit of the inventor's claims a structure where the hinge in elevation is above the driver's position and, with respect to the longitudinal axis of the chassis, is positioned immediately in front of his feet as in certain forms of the accused device. Certainly, the drive-in unit described in the patent or as illustrated in the drawings of the patent is remote from the prior art. Appellees' drive-in units are not closer to the prior art than they are to the patented structure.

E. THE APPELLEES' DRIVE-IN UNITS ARE THE FULL EQUIVALENTS OF THE DRIVE-IN UNIT, EITHER AS DESCRIBED GENERALLY IN THE SPECIFICATION AND AS CLAIMED IN THE PATENT OR AS IS SPECIFICALLY ILLUSTRATED IN THE FIGURES OF THE DRAWING

We have shown that in the results obtained, the means by which the results are obtained and the way in which the means obtain these results, the appellees' accused device is the same as that of the

patented drive-in unit. They are thus full equivalents. See the previous discussion of the structure, function and operation of the patented structure and that of the appellees' drive-in units in which the structures are compared. The identity is strikingly evident. The only difference is that the cab in appellees' drive-in unit is moved rearward a few inches and outriggers are employed. In fact, this is admitted by appellees' counsel in open court at the argument.

"THE COURT: So that you say that the plaintiffs' combination is such that in order to build it as taught in the patent, the legs of the derrick do straddle the cab; is that correct?

"MR. KENWAY: In order to build a unit which meets the language of the claims, you have to have that derrick straddling the cab, yes, sir.

"THE COURT: And your answer to that, as I understand it, is even though we use the same combination, it is different to the extent that the legs of our derrick do not at all straddle the cab.

"MR. KENWAY: Yes, sir.

"THE COURT: So therefore, the claims cannot, as we say, read on our device; is that it?

"MR. KENWAY: Yes, sir, that is just what we do say.

"THE COURT: The file wrapper does not have anything to do with that, does it?

"MR. KENWAY: Oh, yes, it does, your Honor.

“THE COURT: Except as limiting the scope of the claims?

“MR KENWAY: Well, you have —

“THE COURT: Assume there is nothing in the file wrapper, wouldn't you make the same contention?

“MR. KENWAY: No, I don't think I could.

“THE COURT: Why? Because this would be a substantial equivalent; is that it?

“MR. KENWAY: Yes, precisely so. You heard Mr. Moon testify that our construction was the substantial equivalent of what is called for in the claims.” (Record pp. 500-501)

Certainly that which is a substantial equivalent of the claims must be for that reason an infringement.

F. THE CLAIMS SHOULD NOT BE RESTRICTED TO THE SPECIFIC FORM SHOWN IN FIGS. 1 AND 3 OF THE SPECIFICATION OF THE PATENT EXHIBIT 1

1. Nothing in the specification of the patent or in the claims makes form of the essence of the claimed invention and the file wrapper does not limit the claims to the precise structure of the illustrations to require that the hinge and derrick legs be positioned in the precise location shown in the drawings

The location of the hinge with respect to its elevation is described and claimed to be above the driver so that the derrick may be erected at the front of the chassis and permit the derrick when it is laid down to be above the hoist and engine so as not to obstruct the view of the driver (this brief, pp. 9, 12, 29 & 33).

The position of the hinge and the legs with respect to the longitudinal axis is to permit the derrick to be erected at the front of the chassis with two legs to one side of the driver and the other two legs to the other side of the driver.

An applicant for a patent must disclose an embodiment of the invention, but he is not thereby confined to the disclosed specific form. It is the claims and not the specification which measure the invention. *Smith v. Snow*, 294 U.S. 1 at p. 11; 55 S. Ct. 279; 79 L. Ed 721 (quoted in Appendix); *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405; 28 S. Ct. 748; 52 L. Ed 122; *Graver Tank & Mfg. Co. v. Linde Air Products* (1950), 339 U.S. 605, 607; 70 S.Ct. 854, 94 L. Ed 1097; *White v. Dunbar* 1886, 119 U.S. 47, 51-52; 7 S.Ct. 72; 30 L. Ed 303.

Nothing in the evidence or in the specification of the patent or the file wrapper makes the positioning of the derrick hinge immediately above the driver's position rather than above and directly in front such a critical difference as to distinguish the claims from the prior art. *Union Oil Co. of California v. American Bitumuls* (9 C.C.A. 1940), 109 F. 2d 140 at pp. 145-146 discussed infra at pp. 97 & 98 of this Brief).

Justice Curtis' remarks in *Winans v. Denmead*, 15 Howard 330, 342; 14 L. Ed 717, quoted in *Saco-Lowell Shops v. Reynolds* (4th C.C.A. 1944), 141 F.2d 587 at pp. 592-594 (quoted in Appendix) appear most apposite. This case quotes from many cases from various jurisdictions and makes clear the principle that it is not a defense to an action for infringement that the claim relates to a singular form not used by the infringer, where the principle of the invention, the mode

of operation, embodied in a form by means of which a new result is achieved, is appropriated, changing merely the form. See also, *Graver Tank & Mfg. Co. Inc. v. Linde Air Products Co.*, supra; *Hubbel v. United States*, 179 U.S. 77, 80; 21 S. Ct. 24 at p. 25; 45 L. Ed 95; *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* (8th C.C.A. 1901), 106 F. 693, at p. 711; *Angelus Sanitary Can Mach. Co. v. Wilson* (9 C.C.A. 1925), 7 F. 2d 314, at p. 318 (quoted in Appendix); *Chicago Pneumatic Tool Co. v. Hughes Tool Co.* (10th C.C.A.), 97 F.2d 945, quoted with approval in *Stearns v. Tinker* and *Rasor* (9th C.C.A. 1957), 252 F. 2d 589 at p. 596 (quoted in Appendix); *G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co.* (8th C.C.A. 1940; Rehearing den. 1941), 115 F. 2d 958, at p. 963 (quoted in Appendix).

The shifting of the cab rearward is an immaterial change. That the shifting of the cab back and forth is an insignificant variation of the invention covered by the claims will appear from a casual inspection of the various forms of the drive-in units sold by the appellees and by licensees under the patent in suit.

We have reproduced in the Appendix to this brief certain exhibits which illustrate this point.

Thus Exhibits 57, 93 and 94, and the forms of drive-in units shown in Exhibit 54, pages 1883 and 1884, show the hinge at the top of the cab above the driver's position and just in front of the cab top.

Exhibit 57 also shows the structure of page 1883 except as Mr. Woody testified with respect to Exhibit 56 (originally Woody Ex. 3) of which 57 is a reduction.

Mr. Woody testified with respect to this Exhibit (see Record, p. 537):

“Q. You are talking now about figure 3—the position of the cab?

“A. Yes. It is actually set back there and doesn’t extend up quite as high as shown in the illustration.

“Q. It doesn’t make much difference?

“A. No, it doesn’t make a great deal of difference.”

The context of the examination at this point makes clear that Mr. Woody was comparing Exhibit 3 (Ex. 57) with structures actually built, sold and advertised in their catalog.

He testified (Record, p. 551) that the driver’s head is below the hinge (Ex. 57).

That it doesn’t make much difference whether the hinge is somewhat above or moved more closely to the top of the cab or the cab is moved close to or back from the hinge point is clear from the other exhibits reproduced in the Appendix.

Mr. Woody testified that a horizontal distance of only $15\frac{1}{4}$ inches separates the vertical line 30 passing through the hinge axis shown at 26 (Ex. 57) and the line 11 which, as will be seen, passes through the center of the steering wheel (see Record, pp. 546-547).

Exhibit 95 (reproduced in the Appendix) shows the form of Exhibit 59 (Record Vol. III, p. 773) with the derrick erect. The form which is a reduction of Exhibit 58 (originally Woody Ex. 4) corresponds to the unit shown on page 1884 of Exhibit 54 (Record, p. 517).

Exhibit 63 (Woody Ex. 9) shows the structure of page 1884 of Exhibit 54 (Record, p. 519).

Exhibit 65 (Woody Ex. 14) shows the structure of page 1884 of Exhibit 54 (Record, p. 520).

Note, however, that in Exhibit 65 the cab has been moved back, and in the form of Exhibit 63 the cab has been moved forward.

The form shown on page 1810 of Exhibit 55 and that shown in Exhibit 60 (Woody Ex. 5) shows the same hinge arrangement as does the form on page 1810 of Exhibit 55 (Record, p. 518).

Here the cab hinge relationship is similar to that in Exhibit 60, whereas the form of Exhibit 63 shows the cab and the hinge closer together as in the form of Exhibits 57, 59, 93 and 95. Note also the hinge in Exhibits 59, 95, 60, 63 and 65 is at a higher elevation above the cab than that in Exhibits 57, 93 and 62.

It is quite evident that the exact location of the hinge is an immaterial detail as long as it is above the driver and is at the front of the chassis where also is the driver located.

We add here as an illustration the forms of drive-in units manufactured by the licensees under the patent (see Appendix).

The Waldrip unit designed for Waldrip by Mr. Moon (Record, p. 216), is shown in the photographs, Exhibits 33, 34 and 35 (Record Vol. III, pp. 682, 683, 684).

It will appear clearly from the photographs that the hinge axis is just above and just forward of the uppermost corner of the cab.

In the forms of the licensees, Hopper Machine Works, Inc., Ideco Division, Dresser Equipment Co., Wagner-Morehouse (F #2 O III 12—PS 58, Record p. 49) shown in Exhibit 47, page 2367, Exhibit 51, page 2711, and Exhibit 53, page 5309, the hinge is variously positioned as will be observed from the reproductions. Thus in the Ideco unit and in the Wagner-Morehouse unit the hinge is above and ahead of the cab. (See Record, pp. 287-291).

It will appear from these various exhibits that various manufacturers move the elevation of the hinge up or down above the driver's position and move the cab back and forth to suit the variations in the details of their designs, but all of them use essentially the same design and for the same purpose to function all in the same way.

Appellees cannot avoid infringement by changing the form from the precise form illustrated in the drawings of the patent while they retain the principle and mode of operation and attain the results by the same or equivalent means. *Angelus Sanitary Can Mach. Co. v. Wilson et al*, supra.

2. To construe the claims 2 to 5 to limit them to a construction where the cab enters the free area between the rear legs imparts to them the limitations of Claim 1 which do not appear in claims 2 to 5

Thus claim 1 recites that there are two front and two rear legs (Item E(a), Claim 1, Exhibit 1A) and that there is a free area between the rear legs Kb(1). The relative location of the legs and the driver's position is stated as follows (see Item K, Claim 1, Exhibit 1A):

K. and said lower leg portions and said hinges being located with respect to the longitudinal axis of said chassis

- (a) to cause a portion of the driver's position to enter said free area and
- (b) the lower rear leg portions to straddle said driver's position when the derrick is in said erect position.

In claim 1, the location of the driver's position is specified to be located in the manner shown in Figs. 1 and 3 of the Patent Exhibit 1 by reason of the limitation that the driver's position enters the free area between the rear legs. It is to be noted that the term "straddle" is not relied on to specify this feature, or otherwise the recitation of the entry into the free area between the rear legs of the derrick would be redundant.

Claim 2 differs from claim 1 substantially in the difference in the recitation of the location of the derrick legs with reference to the driver's position. Claim 2 does not have the limitation that the rear legs have a free area between a portion of the rear legs and does not require the entry of the driver's position between these rear leg portions. It states merely that there be four legs (Claim 2, Item E(a)) and thus the driver's position be between and straddled by each of the four legs when the derrick is erect (Item K).

Claims 2, 3, 4 and 5, as stated above, also recite the relation of the driver's position to the legs in language which in their ordinary meaning and consonant with the specification makes them of broader scope than claim 1. They do not require that the

driver's position enter into the area between the rear legs of the derrick.

Claims 2 and 3 specify that a portion of the driver's position is "positioned between said leg portions." Here again the term "straddle," which refers to all four legs, is used in connection with the position of all four legs as related to the driver's position.

Claim 4 specifies that there are four legs (Item Gc, Claim 4, Exhibit 1A). The location of these four legs is specified (Item Lb, Claim 4, Exhibit 1A) "said leg portions and said hinge being located with respect to the longitudinal axis of said chassis causing a portion of the driver's position to be positioned between the said leg portions, said leg portions extending from said hinge to rest on the ground and straddle said driver's position with the derrick in said erect position with the hinged derrick in load transference relationship to the ground."

Contrast the definition locating the legs with respect to the driver's position in claims 2, 3 and 4 and the definition of claim 1. In claim 1, where it is desired to locate the driver's position in the relationship specifically shown in the drawings of the patent, the language is "to cause a portion of the driver's position to enter said free area." No such limitation is in claims 2, 3, or 4, (see claims 2 and 4) where the driver's position is stated to be "between" the leg portions, i.e., between the front legs as well as the rear legs.

If, as the Appellees contend, the claims 1-4, which contain the term "straddle," thus define a particular location of the legs, claim 5 omits this requirement.

Claim 5, which was allowed without amendment, can thus not be narrowed by limiting the legs to a particular location along the length of the chassis except that they be so positioned to each side of the driver's position so as to erect the derrick adjacent the front of the chassis. The disclosed invention is not limited in the specification to the form illustrated in the drawing and embodied in claim 1.

We have contended in this brief that the ordinary meaning of the words used in the claims, consonant with the specification of the patent, does not require that the claims be limited to a construction such that the cab enters into the free area between the rear legs (see this Brief, pp. 80-85). We here urge that such limitation of claims 2-5 is improper since it would introduce a limitation present in claim 1 and not present in claims 2-5.

The rule of claim construction requires that the claims be read separately and that limitations in one claim not be read into other claims, provided that the more general claims are not broader than the actual invention. *Kemart Corp. v. Printing Arts Research Laboratories* (9 C.C.A. 1953) 201 F2d 624 at p. 633 (Quoted in the Appendix); *Smith v. Snow* supra at 294 U.S. 1, p. 13 and 14; 55 S.Ct. 279; 79 L.Ed 721 (Quoted in the Appendix); *Electric Machinery Manufacturing Co. v. General Electric Co.* (2nd C.C.A. 1937), 88 F2d 11 at p. 16.

The specification discloses the functions to be achieved by positioning of the hinge adjacent the front end of the chassis, and the positioning of the driver adjacent the front end of the chassis with the hinge above the driver's position in terms which are

satisfied by the forms of the invention as employed by Appellees as well as the form illustrated in the drawings of the patent.

We have discussed this point previously where it is shown that both the form illustrated in the drawings and Appellees' forms produce substantially the same results in substantially the same way by substantially the same means. We have shown that these results, means and manner of operation are not dependent on the particular relative position of the driver and the hinge except that they be both adjacent the front end of the chassis so that the driver can have a clear view ahead. The functions of the invention to give a stable platform during erection are not determined by the location of the driver but by the location of the derrick hinge with respect to the chassis. The driver's position is determined by the requirement that he be close enough to see where he is going and that the derrick can be supported above him. The specification makes this clear and nowhere mentions that the derrick hinge must be so located as to enter the area between the rear legs.

3. The File Wrapper creates no estoppel to limit the claims 2-5 to the form shown in the drawings of the patent and to require that the driver's position enter the area between the rear legs of the derrick

It is to be noted that although this contention was urged by the defendant below (see O-VI-D.S. 20 Record pp. 55-56 and Record pp. 499-500), the court made no finding that the claims are limited by any file wrapper estoppel so that they exclude Appellants' device.

- (a) The claims not being ambiguous do not require any recourse to the file wrapper for their interpretation

In applying the claims to the Appellees' device, it is not necessary in order to spell out infringement to ignore a limitation embodied into the claims in order to induce their allowance by the Patent Office.

This court has held that where the terms of a claim as allowed are clear and not ambiguous, the withdrawal of other claims cannot affect the plain terms of the allowed claims. *Research Products Co. v. Tretolite* (9th C.C.A. 1939) 106 F2d 530 at pp. 535 and 536 (Quoted in Appendix). The same rule has been applied in other jurisdictions. *R. Hoe & Co., Inc. v. Goss Printing Press Co.* (2nd C.C.A. 1929) 30 F2d 271 at p. 275 (Quoted in Appendix); *Ceramic Process Co. v. General Porcelain Enameling & Manufacturing Co.* (7th C.C.A. 1942), 129 F2d 803.

- (b) The burden of proof to establish a File Wrapper Estoppel is on the one who raises it, i.e., the Appellees

George P. Converse & Co. v. Polaroid Corp. (D.C. Dist. of Mass. 1955), 136 F. Supp. 912 at p. 914.

- (c) Analysis of the File Wrapper

(i) Claims as originally filed

The original claims 1 to 5 of the file wrapper (Exhibit T, pp. 9 and 10) did not specify that the hinge was positioned on the derrick and on the chassis; nor that it was positioned above the driver's position; nor did they specify the relative position of chassis-derrick hinge and the hinge between the erecting

mechanism and the derrick; nor that the derrick was a collapsible derrick capable of extension when erected. These five claims were rejected on the McEwen patent on the ground that they called for mere reversal of the McEwen structure. (See page 16 of Exhibit T).

(ii) The added claims

This rejection was not acceded to and an additional claim 6 was presented. (See page 17 of Exhibit T).

Claim 6 differed from claims 1 to 5 in specifying that the ends of the derrick legs protruded ahead of the front wheels, whereas claims 1 to 3 had claimed that they protruded ahead of the cab, and claims 4 to 5 that the legs protruded ahead of the chassis.

Claim 6 did not specify the nature of the derrick nor where the hinge was located except to say that it was mounted at the front end of the chassis. It did not specify the position of the driver and thus would be infringed by positioning the driver at the rear of the vehicle. The claim was construable to cover the hinging of the derrick below the driver.

The Examiner so construed it since he rejected the claim 6 and similar claims on Fiedler 2,496,706, who places the driver in the rear, and on Preston 414,578, whose ladder is hinged below the driver's position. (See page 33 of Exhibit T; see also T-1 and our discussion of these references in this Brief, pp. 76 & 77).

Additional claims 7 to 13 were also presented in a supplemental amendment. (See page 29 of Exhibit T).

Claim 6 was cancelled and some amendments which did not change the substance of the other claims were made. (See Exhibit T, pages 29-31 and pages 35-36). The claims were maintained and argued, the applicant insisting that the claims were patentable. (See Exhibit T, pages 37 to 40).

The Examiner then withdrew these references and rejected the claims on a new combination, to wit, McEwen taken together with Donley 2,251,013 or Luckett 2,406,620. (Exhibit T, pages 42 and 43).

Donley shows a pole type auger for drilling holes for telephone posts. The pole is positioned and may be laid down to one side of the cab (see Figs. 1, 3, 19, see this Brief pp. 75-76). Luckett shows a boom hinged to the bumper of a conventional truck (see Figs. 1 and 2, see this Brief p. 77).

(iii) Cancellation of claims 1-13

The claims were then cancelled and a new set of claims presented, to-wit, claims 14-17. (Exhibit T, pages 47 to 48).

These claims differed from the previously cancelled claims in specifying among other features the following:

Claim 14 differed in specifying the hinge as being positioned adjacent the front end of the chassis.

Claim 16 differed in specifying that the hinge was positioned on the lower end of the derrick and adjacent the front wheels and the top of the cab, which limitation was also contained in claim 17.

Claim 14 specified the position of the hinge as adjacent the front end of the chassis in front of the front axle and made no reference to its relation to the cab.

Claim 15 differed from the cancelled claims in specifying that the hinge was positioned above the cab.

Claim 17 also included a limitation that the **front leg** members straddled the cab. Note that in so defining the position of the front leg members the claim obviously did not intend the word "straddle" to mean that the cab was in the space between the front leg members since no such construction was shown in the patent.

The Examiner's next action, while objecting to the form of the claim, agreed to allow the claims 14, 15 and 17 if changes in language were made. He stated he would allow claim 17 if it is stated that the rear legs rather than the front legs straddled the cab. Claim 16 was rejected on Donley and Luckett in view of McEwen. (See Exhibit T, pages 66 and 67). The Examiner stated:

"The claims should specifically set forth the particular width relationship of the derrick legs and also the location of the cross bracing elements so as to indicate that the derrick legs will straddle the cab without interference with said cab or cross bracing" (Exhibit T, page 66).

* * * * *

"* * * The rear legs of the derrick, as set forth in the specification and not the front legs, as stated in line 19 of claim 17, straddle the cab." (Exhibit T, page 66)

* * * * *

"Upon satisfactory correction of claims 14, 15 and 17 along the lines indicated above such claims appear to be allowable." (Exhibit T, page 67)

It will be observed that at this posture of the prosecution the Examiner did not reject 14 and 15 on the merits and held that the claims which did not contain any limitation as to the straddling of the cab by the rear legs were directed to patentable subject matter, although objectionable as to form. (Exhibit T, pages 66 and 67). He repeated his rejection of claim 16 and made the rejection final.

The Examiner sought to restrict the claims to the form of claim 17 with the amendments which he invited the applicant to adopt to obtain allowance.

(iv) The Cancellation of Claims 14 to 17

The applicant accepted the invitation by introducing such limitation in claim 18, **but did not introduce such limitation in claims 19, 20 and 21, eventually claims 2, 3 and 4 of the patent.**

The applicant urged patentability of the claims not because of any straddling feature which defines only a structure such as illustrated in the figures of the patent. He insisted that his right to a patent, as presented by claims 18-20, was on much broader grounds.

In stating the substance of the interview had prior to presenting the new claims 18-20 applicant summarized, the Examiner's position "with regard to the claims, previously submitted the Examiner has taken the position that there is no invention in reversing the McEwen derrick so it will be erected adjacent the front end of the truck as is shown by pole, boom and mast art references cited. * * * " (Exhibit T, page 76—amendment filed November 25, 1953).

The argument presented in answer was that McEwen when faced with the problem peculiar to mount-

ing of oil well derricks found it necessary to erect the derrick over the rear end of the truck. "He not only did not comprehend applicant's solution, he had no realization of the problem." (Exhibit T, page 76).

It was then asserted that so long as applicant restricts his claims to the collapsible or sectional derricks of four longitudinal braced legs so that when erect the legs transmit the load to the ground, preferably with the derrick tilted, the claims are patentable, pointing out that not all these elements need be in all of the claims (Exhibit T, page 77 and 78). In urging the patentability of the claims applicant stated:

"The only conclusion that can reasonably flow from these facts is that so long as the claims define a structure so as to limit their scope to derricks of the type with which we are concerned as distinguished from poles, masts and booms, and if they further define the structure whereby the derrick is erected adjacent the front end of the truck or chassis, they are clearly allowable." (Exhibit T, page 77, lines 1-8)

With regard to the location of the driver's position backward or forward from the front end of the chassis, it is stated:

"In claim 19 (later claim 2) it is not recited that the driver's position is forward of the front axle. It is obvious that the driver's position may be over the front axle or just to the rear of it. Certainly patentability does not hinge on this limitation." (Exhibit T, page 79, lines 6-11)

It is significant to note that the claims were then not rejected on the prior art but as indefinite. (Exhibit T, page 83, Rejection November 30, 1953). The amendments made did not affect the substance of the claims

with respect to the location of the legs. (Exhibit T, page 84 and 85—supplemental amendment December 29, 1953)

Claim 5 was presented by this amendment and allowed without rejection or amendment.

The history thus shows:

ITEM: That it is not a particularly important part of the invention as disclosed in the specification that the location of the rear legs be as shown in the drawings to cause the cab to enter into the free space between the rear legs;

ITEM: That at no time did applicant accede to the Examiner's statement that the invention was limited to such a structure, but instead insisted that the invention was not so limited and presented claims without specifying that the driver's position is within the periphery of the derrick area, claiming broadly that the legs of the derrick are spread apart wider than the transverse extent of the driver's position so that one set of legs are to one side and another to the other side of the driver's position;

ITEM: That no art was cited showing a drive-in unit employing a collapsible lattice derrick with four legs which was hinged at the front of the chassis above the driver's position, and that applicant at all times insisted that he was entitled to a claim for such structure;

ITEM: That the Examiner accepted claims which did not specify that the rear legs and not the front legs straddle the cab and allowed claims which stated that all the legs straddle the cab (claims 2-4) and ac-

cepted claims which did not refer to straddling (claim 5).

In fact, even express amendments which are not shown by the evidence or the patent to be the critical limitations distinguishing the claims from the prior art on which the claims prior to amendment were rejected by the Examiner, are not to be denied a reasonable interpretation as to equivalents.

Union Oil Co. of California v. American Bitumuls Co. (9th C.C.A. 1940), 109 F2d 140 at p. 145-146

The Montgomery patent involved in the above case was directed to a process for emulsifying asphalt with alkali at a temperature of about 215° F. The applicant originally claimed the process without limitation as to the exact temperature, but merely generally that the emulsification be carried out hot. Such claims were originally rejected on the prior art. The applicant cancelled all claims and instead substituted claims in which the temperature was specified as 100° C., and later, at the request of the Patent Office to convert the Centigrade designation into Fahrenheit, changed it to 215° F. The Court stated that the applicant had protested the rejection of the claims on the prior art and maintained at all times that his hot method of emulsification was an invention over the prior art method of cold emulsification. He stated that the prior art, primarily the Page patent, did not contemplate the emulsification of hot asphalt by caustic alkali. He maintained in an oral interview with the Examiner that the prior art taught that in order to emulsify oils with alkali it was necessary to add a saponifiable ma-

terial before mixing. He stated it was his discovery that it was not necessary to do so and that he could emulsify the asphalt with caustic without adding such saponifiable material. The Court commented that apparently the Patent Office abandoned its contention that the prior art Page reference contemplated the emulsification of melted asphalt by caustic as was contended by the applicant and as would appear from the Page patent. The Court stated:

“We see nothing in the occurrences in the Patent Office which would estop the claimant from a reasonable interpretation of his patent claims as to temperature regardless of the specific temperature mentioned in the claims which is nowhere indicated either in the patent or by the evidence to have been a critical temperature.” (p. 145-146)

See also:

Holstensson v. Webcor, Inc. (D.C. N.D. Ill. E.D. 1957), 150 F. Supp. 441; *Electric Machinery Mfg. Co. v. General Electric Co.* (2nd C.C.A. 1937), 88 F2d 11, 16 and cases therein cited; *G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co.* (8th C.C.A. 1940, Rehearing den. 1941) 115 F2d 958 at 963 (Quoted in Appendix).

Whatever may have been the Examiner's original position with respect to the allowance of claims, the fact that he allowed broader claims may be as the 2nd Circuit Court and Judge Yankwich have remarked that he simply changed his mind and recognized the broader aspects of the invention. *Joints, Inc. v. Garrett* (D.C.S.D. of Cal. Central Div.), 102 F. Supp. 760 at 761 (Quoted in Appendix).

See also:

Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co. (2nd C.C.A. 1911), 194 F. 427 at p. 430 (Quoted in Appendix); *Landis Mach. Co. v. Parker-Kalon Corp.* (2nd C.C.A. 1951), 190 F2d 543, 544.

The allowance of claims 2-4 which do not contain the limitation that the driver's position enters the free space between the rear legs and the allowance of claim 5 which does not refer to straddling makes clear that these claims are not to be limited to the construction of claim 1 of the patent. *Smith v. Snow* cited supra, 294 U.S. 1 at p. 13, 14 and 15 (Quoted in Appendix).

See also:

Hunt v. Armour & Co. (7th C.C.A. 1950), 185 F2d 722 at p. 729; *Sanitary District of Chicago v. Activated Sludge, Inc.* (7th C.C.A. 1937), 90 F2d 727; *Holstensson v. Webcor, Inc.* (U.S.D.C. N.D. Ill. E.D. 1957), 150 F. Supp. 441; *Electric Machinery Mfg. Co. v. General Electric Co.* (2nd C.C.A. 1937), 88 F2d 11, 16 and cases therein cited; *G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co.* (8th C.C.A. 1940), 115 F2d 958 at p. 963 (Quoted in Appendix); *Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co.* (2nd C.C.A. 1911), 194 F.427, p. 430 (Quoted in Appendix); *Landis Mach. Co. v. Parker-Kalon Corp.* (2nd C.C.A. 1951), 190 F2d 543, 544.

(d) The claims are entitled to the range of equivalents permitted by the prior art cited by the Examiner in rejecting the claims

There is nothing in the history of the prosecution of the application as evidenced by the file wrapper to support any contention that applicant in order to ob-

tain a patent disclaimed the forms of the drive-in unit as employed by Appellees in order to obtain a patent for the form shown in Figs. 1-3 of the patent. Nothing in the prior art required this for none of the prior art showed any drive-in unit.

The file wrapper estoppel thus is for this reason also of no avail to Appellees in their effort to appropriate the entire invention by a change in an immaterial respect in the form of the invention as shown in the drawings of the patent. The claims include Appellees' form also. *Hunt Tool Company v. Lawrence* (5th C.C.A. 1957), 242 F2d 347 at p. 354 (Quoted in Appendix); *Cutter Laboratories v. Lyophile-Cryochem Corp.*, (9th C.C.A. 1949).

VI

CONCLUSION

The sum of the matter on the issue of infringement lies in this; the Trial Court having found that the drive-in portable derrick of the patent claims is an inventive advance over the prior art held that the Appellees avoid infringement by moving the cab back some 15 or so inches without in any other way changing any essential element of the invention. The change makes no difference in the results obtained, or in the way the results are obtained or in the means by which the results are obtained. In all these respects Appellees' drive-in portable derrick and the patented portable derrick is the same.

None of the prior art shows any drive-in portable derrick and none of the prior art describes any de-

vice which has the function or gives the results obtained by the patented drive-in portable derrick or by Appellees' drive-in portable derrick. That the back-in portable derrick does not produce the results nor operate in the same way as does the drive-in portable derrick is a settled fact in this litigation and was so found by the Trial Court.

That Appellees' drive-in portable derricks are the full equivalent is established by the evidence and was admitted by Appellees counsel in open court.

In no way do Appellees' drive-in portable derricks resemble the prior art more closely than they resemble the patented drive-in portable derricks. In what way can it be said that Appellees' drive-in portable derricks are outside the range of equivalents available to the claims of the patent? This can be said only if the claims are given an interpretation which limits them to the very form of the drive-in portable derrick illustrated by the drawings of the patent.

But none of the claims is limited to this form and the specification does not make this form an important part of the invention. The claims read directly and unambiguously on Appellees' drive-in portable derricks. To construe claims 2 to 5 so as to add the limitation of claim 1 that the driver's position enters the free area between the rear legs would introduce this limitation, found in claim 1, into claims 2-5 where it does not appear nor is this made necessary by any file wrapper estoppel. Although claim 1 contained such limitation, applicant did not add such limitation to claims 2-5 and insisted that the invention was of broader scope. In fact he added claim 5 which was allowed without amendment.

It is submitted that having found the claims to be for an inventive advance over the prior art, the Trial Court was clearly wrong in permitting the Appellees to appropriate the very heart of the invention by making an immaterial change in its form.

It is submitted that this Honorable Court should reverse the lower Court's judgment of non-infringement.

Respectfully submitted,

.....

PHILIP SUBKOW

*In propria persona and
Attorney for Appellants*

APPENDIX

U. S. CODE, TITLE 35; PATENTS

Sec. 102. Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had

not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other. (R.S. 4886, 4887, 4923; 35 U.S.C., 1946 ed., 31, 32, 72.)

Sec. 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Vehicle Code State of California as amended to 1945.

Chapter 2. Regulations Governing Size, Weight and Load

694. Width of Vehicles. (a) The total outside width of any vehicle or the load thereon shall not exceed 96 inches, except as otherwise provided in this section.

(b) When any vehicle is equipped with pneumatic tires the maximum width from the outside of one wheel and tire to the outside of the opposite outer wheel and tire shall not exceed 100 inches, but in such event the

outside width of the body of such vehicle or the load thereon shall not exceed 96 inches.

698. Length of Loads. (a) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle if it is equipped with such a bumper.

704. Axle Weight Limits. The gross weight imposed upon the highway by the wheels on any one axle of a vehicle shall not exceed 18,000 pounds and the gross weight upon any one wheel, or wheels, supporting one end of an axle, and resting upon the roadway shall not exceed 9,500 pounds except as follows: As to vehicles first registered prior to January 1, 1930, the gross weight imposed upon the highway by the wheels on any one axle shall not exceed 18,000 pounds and the weight upon any one wheel shall not exceed 11,000 pounds but this exception shall terminate December 31, 1942.

Amended Ch. 281, Stats. 1937. Effective Aug. 27, 1937.

Amended Ch. 788, Stats. 1939. Effective Sept. 19, 1939.

Amended Ch. 392, Stats. 1941. Effective Jan. 1, 1942.

705. Ratio of Weight to Length. *Every vehicle whether operated singly or in a combination of vehicles, and every combination of vehicles must comply with both subdivisions (a) and (b) of this section. The limitations imposed by this section are in addition and supplemental to all other provisions of this code imposing limitations upon the size and weight of vehicles.*

(a) *The total gross weight with load imposed on the highway by any group of two or more consecutive axles of a vehicle or of a combination of vehicles where*

the distance between the first and last axles of said two or more consecutive axles is 18 feet or less, shall not exceed that given for the respective distance in the following table:

Distance in feet between first and last axles of group	Allowed load in pounds on group of axles
3.....	30,100
4.....	30,800
5.....	31,500
6.....	32,200
7.....	32,900
8.....	33,600
9.....	34,300
10.....	35,000
11.....	35,700
12.....	36,400
13.....	37,100
14.....	43,200
15.....	44,000
16.....	44,800
17.....	45,600
18.....	46,400

(b) The total gross weight with load imposed on the highway by any vehicle or combination of vehicles where the distance between the first and last axles is more than 18 feet shall not exceed that given for the respective distances in the following table:

Distance in feet	Allowed load in pounds
18.....	46,400
19.....	47,200
20.....	48,000
21.....	48,800
22.....	49,600
23.....	50,400

Distance in feet	Allowed load in pounds
24.....	51,200
25.....	55,250
26.....	56,100
27.....	56,950
28.....	57,800
29.....	58,650
30.....	59,500
31.....	60,350
32.....	61,200
33.....	62,050
34.....	62,900
35.....	63,750
36.....	64,600
37.....	65,450
38.....	66,300
39.....	67,150
40.....	68,000
41.....	68,000
42.....	68,000
43.....	68,000
44.....	68,000
45.....	68,000
46.....	68,800
47.....	69,600
48.....	70,400
49.....	71,200
50.....	72,000
51.....	72,800
52.....	73,600
53.....	74,400
54.....	75,200
55.....	76,000
56 or over.....	76,800

708. Gross Weight per Inch Width on Certain Tires.

(a) The gross weight upon a solid tire upon a vehicle shall not exceed 600 pounds upon any inch of the channel base width of such tire.

(b) The gross weight of any vehicle and load resting upon any metal tire in contact with the roadway shall not exceed 500 pounds upon any inch of the width of such tire but this limitation shall not apply to traction engines or tractors, the propulsive power of which is not exerted through wheels resting upon the roadway but by means of a flexible band or chain, known as a moveable track, when the portions of the movable tracks in contact with the surface of the roadway present plane surfaces.

Smith v. Snow, 294 U.S. 1 at pp. 11, 13-16, 55 S. Ct. 279; 79 L Ed. 721

“We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor’s method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent, not its specifications, measure the invention. *Paper Bag Patent Case*, 210 U.S. 405, 419; *McCarty v. Lehigh Valley R. Co.*, 160 U.S. 110, 116; *Winans v. Denmead*, 15 How. 330, 343. While the claims of a patent may incorporate the specifications or drawings by reference, see *Snow v. Lake Shore R. Co.*, 121 U.S. 617, 630, and thus limit the patent to the form described in the specifications, it is not necessary to embrace in the claims or describe in the specifications all possible forms in which the claimed principle may be reduced to practice. It is enough that the principle claimed is exemplified by a written description of it and of the manner of using it ‘in such full, clear, concise, and exact terms’ as will enable one ‘skilled in the art to make, construct, compound and use the same.’ ” (p. 11) * * *

“It is evident that Claim 1 does not prescribe that the current of air shall be propelled by any particular means, except that it shall be by means other than variation of temperature, nor does it prescribe that the means of propulsion shall be given any particular location, or that the current of air shall be guided by any particular means or given any particular direction. The omission of these requirements from Claim

1 is the more pointed as the other claims of the patent speak in particular of a power-driven fan, of the location of the fan, of curtains and a partition obviously intended to give direction to the current of air, of a vertically directed current of air, and of air circulating from the bottom of the chamber into the parts of it occupied by the tiers of egg trays *Thus by striking an obviously intended contrast with other claims, Claim 1 covers broadly the essential elements of the Smith invention as we have already described it. Symington Co. v. National Malleable Castings Co., 250 U.S. 383, 385; Lamson Consolidated Store Service Co. v. Hillman, 123 Fed. 416, 419 (C.C.A. 7th); Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills, 209 Fed. 210, 214 (C.C.A. 6th).*" (Emphasis added)

"Examination of the claim, in the light both of scientific fact and of the particular form in which the petitioner reduced the claim to practice as described in the specifications, makes it plain that the claim does not call for a particular order or arrangement of the eggs in staged incubation in the incubator, or that the propelled current should reach them in any particular order, or that it should be guided, controlled or directed by any particular means, or in any particular manner other than that it should be of sufficient velocity to produce the results prescribed by the claim. If the matter were doubtful, it is plain from what has been said that the character of the patent and its commercial and practical success are such as to entitle the inventor to broad claims and to a liberal construction of those which he has made. *Moreley Machine Co. v. Lancaster*, 129 U.S. 263, 273-277; *Eibel Co. v. Paper Co.*, 261 U.S. 45, 63; *Winans v. Denmead*, *supra*, 341. In

such circumstances, if the claim were fairly susceptible of two constructions, that should be adopted which will secure to the patentee his actual invention, rather than to adopt a construction fatal to the grant, *Keystone Manufacturing Co. v. Adams*, 151 U.S. 139, 144, 145; *McClain v. Ortmyer*, 141 U.S. 419, 425.

“2. We find nothing in the file wrapper defense to disturb our conclusion as to the correct interpretation of Claim 1. It is a familiar rule that a patentee cannot broaden his claim by dropping from it an element which he was compelled to add in order to secure his patent. *I. T. S. Rubber Co. v. Essex Rubber Co.*, 272 U.S. 429, 443; *Smith v. Magic City Club*, 282 U.S. 784, 789, 790. But the file wrapper lends no support for the application of this rule to petitioner’s Claim 1.

“The history of Smith’s application in the Patent Office is a long one. Four groups of method claims were successively presented to the Patent Office and three were successively rejected. The fourth group ultimately matured into Claims 1, 2, and 3 of the patent. It suffices to say that Claims 1 and 25 of the first group claimed broadly, ‘The method of hatching eggs by arranging the eggs in a column and applying heated air forced about the eggs, the heated air being adapted to the eggs in various stages of incubation,’ and ‘the method of hatching eggs by arranging the eggs in a column one above the other and forcing heated air through said column.’ In due course the broad claims thus asserted were modified and narrowed by the inclusion of new elements, until they appeared in the form of Claim 1 of the patent. But, as we have seen, none of these additions involves any particular order of arrangement of the eggs or any particular direction

or control of the air current, except that the current is to be 'of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature.'

"It is an illuminating fact that the entire written argument filed in support of Claim 1, as it was finally presented to the Patent Office and allowed, makes no reference to any order or arrangement of the eggs, or to shifting the location of the eggs in the incubator, no reference to the location of the fan, the direction of the air current, or to curtains or partitions. The features emphasized were the superiority, over drafts caused by variations of temperature, of 'current produced by mechanical means' applied to eggs in staged incubation arranged at different levels, the conservation of moisture, and the elimination of foul air by the restricted air outlets, all features of Claim 1 which are characteristic of both petitioner's and respondents' incubators. We find nothing in the file wrapper to suggest that any addition was made to Claim 1 to restrict the patent to any particular order of arrangement of the eggs or any particular direction or means of control of the current of air, other than its velocity, and nothing to estop the patentee from asserting that the claim is not restricted by such features. See *Baltzley v. Spengler Loomis Mfg. Co.*, 262 Fed. 423, 426 (C. C. A. 2d); *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 714 (C. C. A. 8th). *It is of no moment that in the course of the proceedings*

*in the Patent Office the rejection of narrow claims was followed by the allowance of the broader Claim 1. Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co., 194 Fed. 427, 430 (C. C. A. 2d) (Emphasis added) (p. 13-16) * * **

Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co. (2nd C.C.A. 1911), 194 F. 427 at p. 430

“We have reached the conclusion of invalidity without referring to the proceedings in the Patent Office because we fail to see that those proceedings have any bearing upon the questions arising in this case. Sometimes such proceedings are of importance, especially where a matter of estoppel is involved. Thus a patentee who, in order to avoid a rejection of his application, inserts limitations in his claims is estopped from contending that the patent as issued should be construed as if such limitations had not been made. But, as a general rule, the interpretation to be placed upon the claims and specification of a patent is to be determined from the language of the grant, and the proceedings in the Patent Office are quite immaterial. Such is the situation in the present case. Original claims were rejected in the Patent Office. Thereupon the applicants, instead of limiting their claims, substituted broader ones which were accepted. Presumably the examiner changed his mind. But whatever be the explanation of his position, nothing whatever is shown to work an estoppel against the patentees. Instead of surrendering something which they now claim to obtain that which was allowed, they claimed something more and got it.” (p. 430)

Angelus Sanitary Can Mach. Co. v. Wilson et al (9th CCA, 1925), 7 F2d, 314 at p. 318.

“Appellants rely much upon the file wrapper which shows that Wilson’s claim 2 (originally claim 6) was rejected and then amended to avoid references (Brenzinger, No. 813,482, Black, No. 858,785, and Wegner, No. 1,164,751) cited against them. Originally the claim did not have the words “encircling the can top” before the word ‘for,’ and prior to Wilson’s amendment considerable correspondence was had between the Patent Office and appellants; Wilson contending that the references to Brenzinger and Black were not well founded. Conceding the principle that by amending Wilson is limited to the form and language of the claims as allowed, nevertheless *he is not limited to any detailed specific construction to avoid any reference cited against it, nor is he estopped from claiming by the amended claim every improvement and combination which he has invented and which was not disclosed by those references. National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 F. 693, 715 45 C. C. A. 544; *Owens Co. v. Twin Separator Co.*, 168 F. 259, 93 C. C. A. 561; *Auto Pneumatic Action Co. v. Kindler & Collins*, 247 F. 323, 159 C. C. A. 417. (Emphasis added)

“To apply that principle: The words ‘eccentric encircling ring’ are not found in the amendment to Claim 2; nor is the claim limited to exact features, as, for example, was the claim discussed in *Wilson & Willard Mfg. Co. v. Union Tool Co.*, 249 F. 729, 161 C.C.A. 639, certiorari denied 248 U.S. 559, 39 S. Ct. 6, 63 L. Ed. 421. Therefore there should be no meaning put upon the words “encircling can top” by which there is

a limitation to the eccentric encircling ring, unless the specifications and the drawings, which showed eccentric rings, taken in connection with Wilson's claim 2, make it obvious that he has limited his claim to the use of eccentric rings. The Patent Office may have distinguished Wilson's type of machine from others by reason of specification of the encircling in the first seaming means, but such distinction does not necessarily limit all other elements to that specified eccentric ring with a cam bearing upon it. Interpretation of the claim as allowed may be broad enough to cover improvement other than is disclosed by the references cited against it. In *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, supra, the court, through Judge Sanborn, said: '*The description in a specification or drawing of details which are not, and are not claimed as, essential elements of a combination, is the mere pointing out of the better method of using the invention . . . A reference in a claim to a letter or a figure used in a drawing and in the specification to describe a device or an element of a combination does not limit the claim to the specific form of that element there shown, unless that particular form was essential to, or embodied the principle of, the improvement claimed.*' (Emphasis added)

"We regard claim 2, in the element of encircling means, as entitled to a construction which includes a fairly liberal range of equivalents. The difference in the use of a mechanical equivalent does not avoid infringement. In *Eibel Process Co. v. Paper Co.*, 261 U.S. 45, 43 S.Ct. 322, 67 L. Ed. 523, the court, through the Chief Justice, clearly reiterated the doctrine that where an inventor, though not a pioneer in the sense of hav-

ing created a new art, has made a very useful discovery which has substantially advanced the art, his patent, though but an improvement on an old machine, may be entitled to liberal treatment. That same principle was applied by this court in *Smith Cannery Co. v. Seattle Astoria Iron Works* (C. C. A.) 261 F. 87. *Defendants therefore cannot escape infringement by adding to or taking from the patented device by changing its form, or even by making it somewhat more or less efficient, while they retain its principle and mode of operation and attain its results by the use of the same or equivalent mechanical means. Lourie v. Lenhart*, 130 F. 122, 64 C. C. A. 456; *Letson v. Alaska Packers Association*, 130 F. 129, 64 C. C. A. 463; *Eck v. Kutz* (C. C.) 132 F. 758. By varying the encircling means, but producing the same results in substantially the same manner, there is infringement. Both physical and mechanical encircling with centering are found in defendants' machine. *Union Paper Bag Machine Co. v. Murphy*, 97 U.S. 120, 24 L. Ed. 935; *Kinloch Telephone Co. v. Western Electric Co.*, 113 F. 659, 51 C. C. A. 362; *Auto Pneumatic Action Co. v. Kindler & Collins*, supra; *Pangborn Corporation v. Sly Mfg. Co.* (C. C. A. 284 F. 217." (Emphasis added) (p. 318)

R. Hoe & Co. Inc. v. Goss Printing Press Co.
(2nd C. C. A. 1929), 30 F2d 271 at p. 275.

“Upon the issue of infringement we are not in agreement with the District Judge. While we think the claim is of small compass, the defendant's machine answers every element, both verbally and functionally. Nor do we see the pertinency of the cancellation of claim 15 in the office. We have repeatedly said that

we will not look to the file wrapper for estoppels, except in case the patentee tries to expand his claim by omitting an element which leaves it identical with one which he has abandoned. *Westinghouse Electric v. Condit Electrical Co.*, (C. C. A.) 194 F. 427, 430; *Auto Pneumatic Co. v. Kindler & Collins*, (C. C. A.) 247 F. 323, 328; *Spalding v. Wanamaker*, (C. C. A.) 256 F. 530, 553, 534." (p. 275)

Research Products Co. v. Tretolite Co., (9th C.C.A. 1939) 106 F. 2d 530 at pp. 535-536.

"Upon the claim of non-infringement the appellants contend that the claims of the patent are limited by occurrences in the patent office shown by the file wrapper. It is shown that claim 14 specifying the use of a sulfonated oil as a treating agent was withdrawn; hence that the 'sulfonated oil' used by the appellants cannot infringe. Claim 14, the special master held, was broad enough to include treatment by modified mineral oils, not shown or included in the specifications and hence the claim was properly withdrawn. In any event its withdrawal did not affect the plain terms of the claims allowed. *Such withdrawal would only be important where the allowed claims were ambiguous.*" (Emphasis added) (p. 535, 536)

G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co., (8th C. C. A. 1941) 115 F. 2d 958 at pp. 962-963.

"It is of no consequence that, in the course of the proceedings in the Patent Office, the rejection of narrow claims was followed by the allowance of a broader

caim. *Westinghlouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co.*, 2 Cir., 194 F. 427, 430; *Smith v. Snow*, 294 U.S. 1, 16, 55 S.Ct. 279, 79 L.Ed. 721; See and compare, *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 8 Cir., 106 F. 693, 714.

“The defendant also contends that Claim 4 must be read in the light of the specification and drawings, and that, when so read, it is apparent that the accused device does not infringe, because the dispensing element attached to the plunger of that device is different.

“The particular forms of devices described in specifications are to be considered as the forms which are preferred by the inventor. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 418, 28 S.Ct. 748, 52 L.Ed 1122; *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 8 Cir., 106 F. 693, 715; *J. L. Owens Co. v. Twin City Separator Co.*, 8 Cir., 168 F. 259, 266; *McDonough v. Johnson-Wentworth Co.*, 8 Cir., 30 F.2d 375, 384. ‘An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. . . . The invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention. They may be explained and illustrated by the description.’ *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 418, 419, 28 S.Ct. 748, 751, 52 L.Ed. 1122. ‘In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim.’ *Cimiotti Unhairing Co. v.*

American Fur Refining Co., 198 U.S. 399, 410, 25 S.Ct. 697, 702, 49 L.Ed. 1100. See, also, *McDonough v. Johnson-Wentworth Co.*, 8 Cir., 30 F.2d 375; *Smith v. Snow*, 294 U.S. 1, 11, 55 S.Ct. 279, 79 L.Ed. 721. The character of a patent and its commercial and practical success may be such as entitle the inventor to broad claims and to a liberal construction of those he has made. *Smith v. Snow*, 294 U.S. 1, 14, 55 S.Ct. 279, 79 L. Ed. 721.

“It is also to be remembered that the doctrine of equivalents is applied to other than primary or generic patents and that, while the range of equivalents depends upon the extent and nature of the invention, even a nongenerac or specific patent is entitled to some range of equivalents. ‘Any patent, however, has some range of equivalents, unless form is made the indispensable thing. And the rule is especially applicable where the infringer takes the whole gist of the invention, as in this case.’ *Frick Co. v. Lindsay*, 4 Cir., 27 F.2d 59, 62. See, also, *McDonough v. Johnson-Wentworth Co.*, 8 Cir., 30 F.2d 375, 384; *Freeman v. Altwater*, 8 Cir., 66 F.2d 506, 510, 511.” (p. 962, 963)

Saco-Lowell Shops v. Reynolds, 141 F.2d 587
at pp. 593-594.

“The principle applicable is that stated by Mr. Justice Curtis in the leading case of *Winans v. Denmead*, 15 How. 330, 342, 14 L.Ed. 717, as follows:

‘It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors would

be valueless, if it were enough for the defendant to say, your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed. The answer is, my improvement did not consist in a change of form, but in the new employment of principles or powers, in a new mode of operation, embodied in a form by means of which a new or better result is produced; it was this which constituted my invention; this you have copied, changing only the form; * * * ’

“And the rule was applied and stated with great clarity by Mr. Justice Clifford in *Union Paper-Bag Machine Co. v. Murphy*, 97 U.S. 120, 24 L.ED. 935, from which we quote as follows:

“ ‘Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.

“ ‘Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained.

“ ‘Inquiries of this kind are often attended with difficulty; but if special attention is given to such portions of a given device as really does the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome. *Cahoon v. Ring* (Fed. Cas. No. 2,292), 1 Cliff. (592), 620.

“ ‘Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape. *Curtis, Patents* (4th ed.), sec. 310.’

“And in the comparatively recent case of *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 41, 50 S.Ct. 9, 12, 74 L.Ed. 147, the Supreme Court, in holding a latch for refrigerator doors infringed by a device which employed the same principle of operation with a slight rearrangement of parts, said:

“ ‘There is a substantial identity, constituting infringement, where a device is a copy of the thing

described by the patentee, 'either without variation, or with such variations as are consistent with its being in substance the same thing.' *Burr v. Duryee*, 1 Wall. 531, 573, 17 L.Ed. 650. Except where form is of the essence of the invention, it has little weight in the decision of such an issue; and, generally speaking, one device is an infringement of another 'if it performs substantially the same function in substantially the same way to obtain the same result. . . . Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape.' *Union Paper Bag Machine Co. v. Murphy*, 97 U.S. 120, 125, 24 L.Ed. 935. And see *Elizabeth v. Pavement Co.*, 97 U.S. 126, 137, 24 L.Ed. 1000. That mere colorable departures from the patented device do not avoid infringement, see *McCormick v. Talcott*, 20 How. 402, 405, 15 L.Ed. 930. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. *Ives v. Hamilton*, 92 U.S. 426, 430, 23 L.Ed. 494.' "

"In *Claude Neon Lights, Inc. v. E. Machlett & Son et al.*, 2 Cir., 36 F.2d 574, 576, Judge Learned Hand pointed out that the doctrine of equivalents means more than that the language of claims shall be

generously construed, being based upon the theory that the claim is not intended to be verbally definitive, but to cover the invention, which should to some extent be gathered from the disclosure at large. Summarizing his conclusion, with respect to the apparent conflict between the doctrine of equivalents and the doctrine that the patent is limited by the claims, he says:

“ ‘On the one hand, therefore, the claim is not to be taken at its face—however freely construed—but its elements may be treated as examples of a class which may be extended more or less broadly as the disclosure warrants, the prior art permits, and the originality of the discovery makes desirable. On the other, it is not to be ignored as a guide in ascertaining those elements of the disclosure which constitute the ‘invention,’ and without which there could be no patent at all.’

“See also *Smith v. Snow*, 294 U.S. 1, 55 S.Ct. 279, 79 L.Ed. 721; *Waxham v. Smith*, 294 U.S. 20, 55 S.Ct. 277, 79 L.Ed. 733; *Moreley Sewing Machine Co. v. Lancaster*, 129 U.S. 263, 9 S.Ct. 299, 32 L.Ed. 715; *Imhaeuser v. Buerk*, 101 U.S. 647, 656, 25 L.Ed. 945; *Oates v. Camp*, 4 Cir., 83 F.2d 111; *Hoeltke v. C. M. Kemp Mfg. Co.*, 4 Cir., 80 F.2d 912; *Wine Ry. Appliance Co. v. Baltimore & O. R. Co.*, 4 Cir., 78 F.2d 312; *Black & Decker Mfg. Co. v. Baltimore Truck Tire Service Corp.*, 4 Cir., 40 F.2d 910; *Gulf Smokeless Coal Co. v. Sutton, Steele & Steele*, 4 Cir., 35 F.2d 433; *Frick Co. v. Lindsay*, 4 Cir., 27 F.2d 59; 20 R.C.L. 1155, 1156.” (p. 593, 594)

Cutter Laboratories v. Lyophile-Cryochem Corp., (9th C.C.A. 1949) 179 F.2d 80 at p. 89.

“Appellant invokes the doctrine of *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U.S. 274, 24 L.Ed. 344, that no limitation which a patentee puts into his claim may be ignored, whether or not the limitation was necessary to validate the claim. See, also, *Fay v. Cordesman*, 109 U.S. 408, 3 S.Ct. 236, 27 L.Ed. 979. One reason for this rule is to give notice to possible infringers of the claim’s limits; another is to relieve the courts of the burden of deciding just what elements are material to the validity of the claim. But where attempts are made to avoid infringement by a relatively slight, well known variation in the claimed process or product, the strict rule is relaxed by the doctrine equivalents. ‘Without that doctrine every claim is indeed entitled to be interpreted in the light of the specifications as a whole, and not to be read merely with a dictionary. But often even with the most sympathetic interpretation the claim cannot be made to cover an infringement which in fact steals the very heart of the invention: no matter how auspiciously construed, the language forbids. It is then that the doctrine of equivalents intervenes to disregard the theory that the claim measures the monopoly and ignores the claim in order to protect the real invention. *Claude Neon Lights v. Machlet & Son*, 2 Cir. 36 F.2d 574; see also, *Otis Elevator Co. v. Atlantic Elevator Co.*, 2 Cir., 47 F.2d 545, 547; *Oates v. Camp*, 4 Cir., 83 F.2d 111, 116.’ *Keith v. Charles E. Hires Co.*, 2 Cir., 116 F.2d 46, 48.” (p. 89) * * *

Kemart Corp. v. Printing Arts Research Laboratories, (9th C.C.A. 1953) 201 F.2d 624 at 627-628, 633.

“Since we are of the opinion that the Marx Patent is not infringed by appellant’s process, we shall proceed immediately to discuss that question. Appellee urges that the trial court’s finding of infringement was a finding of fact, not to be disturbed unless clearly erroneous. However, it is well settled that where, as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law, depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency.⁵

5. *United States v. Esnault-Pelterie*, 303 U.S. 26, 30, 58 S.Ct. 412, 82 L.Ed. 625; *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 36, 50 S.Ct. 9, 74 L.Ed. 147; *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 153, 71 S.Ct. 127, 95 L.Ed. 162; *Stuart Oxygen Co. v. Josephian*, 9 Cir., 162 F.2d 857, 859; *Hanovia Chemical & Mfg. Co. v. David Buttrick Co.*, 1 Cir., 127 F.2d 888, 889-891; *Galland-Henning Mfg. Co. v. Logemann Bros. Co.*, 7 Cir., 142 F.2d 700, certiorari denied 323 U.S. 767, 65 S.Ct. 120, 89 L.Ed. 614; cf. *Chas. H. Lilly Co. v. I. F. Laucks, Inc.* 9 Cir., 68 F.2d 175, 186, certiorari denied 293 U.S. 573, 55 S.Ct. 84, 79 L.Ed. 671; *Wire Tie Mach. Co. v. Pacific Box Corp.*, 9 Cir., 102 F.2d 543, 552, affirmed on rehearing, 9 Cir., 107 F.2d 54; *Gomez v. Granat Bros.*, 9 Cir., 177 F.2d 266, 269, certiorari denied 338 U.S. 937, 70 S.Ct. 351, 94 L.Ed. 578. (pp. 627-628) * * *

“To support his contention that this finding and judgment is consistent with a finding of infringement of the other claims, appellee invokes the rule that in interpreting a series of claims, a limitation not present

in one must not be implied where the same limitation appears in later claims.²⁴ The reason of the rule is that each claim is in theory a separate patent, so that two claims should not be so construed as to make them identical.²⁵

24. *Western States Mach. Co. v. S. S. Hepworth Co.*, 2 Cir., 147 F.2d 345, 350, certiorari denied 325 U.S. 873, 65 S.Ct. 1414, 89 L.Ed. 1991; *Grayson Heat Control, Ltd. v. Los Angeles Gas Appliance Co., Inc.*, D.C., 40 F.Supp. 928, 935, affirmed, 9 Cir., 134 F.2d 478.

25. *Grayson Heat Control, Ltd. v. Los Angeles Gas Appliance Co.*, supra, note 24." (p. 633)

Hunt Tool Company vs. Lawrence (5th C.C.A. 1957), 242 F.2d 347 at p. 354.

"Also, since the patent examiner's objection was with reference to the prior art, appellants are protected by file wrapper estoppel only if they can show that their alleged infringement is in an area to which the prior art could possibly have been thought to extend so as to make it impossible to make valid claims there, for there is no reason to presume that applicant made a disclaimer broader than necessary to yield to the actual challenge to his claim. See *New York Scaffolding Co. v. Whitney*, 8 Cir., 224 F. 452, 462, certiorari denied, 239 U.S. 640, 36 S.Ct. 161, 60 L.Ed. 482." (p. 354)

Stearns v. Tinker & Rasor, (9th C.C.A. 1958) 252 F. 2d 589 at pp. 596-597.

"It is axiomatic that only a claim of a patent can be infringed. The claims of a patent measure the scope of a patent monopoly. * * *

“In *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 10 Cir., 97 F.2d 945, 946, it is stated:

“ ‘It is contended that there is lack of infringement for the reason that the patent is limited to a structure in which the teeth on one cone have an interfitting relation with those on the other, while in the accused assembly the cones are spaced apart in such manner that the teeth do not interfit. The claims do not provide that the teeth shall interfit. Claims 2 and 3 provide that they shall be adapted to interfit, and claims 3 and 4 are silent in respect of the matter. The specifications described the invention with particular reference to the interfitting feature of an earlier patent issued to Scott, and the diagrammatical drawing discloses interfitting teeth. But it is not essential that all of the embodiments of a patent be described. It is enough if the invention be described together with that mode which is conceived to be the best for putting it into practical use; and where that has been done, the patent is not confined to the precise mode outlined. [Cases cited.]

“ ‘Neither is it necessary that every embodiment be illustrated by the drawings unless the form of the device is the principle of the invention. Where the particular form is not an embodiment of the principle of the asserted invention, the patent is not restricted to the exact form of construction shown in the diagrammatical drawing. And a device infringes if it embodies the essential principles taught by the patent, even though there is a departure from the drawings to the extent of simple changes which would be readily conceived

and made by a mechanic in the course of constructing a device on the patent.' [Cases cited.] See also *Cameron Iron Works v. Stekoll*, 5 Cir., 1957, 242 F.2d 17.

"We think the above quotation is particularly applicable to the instant case. The invention of the Stearns patent is not solely the 'means' used to 'push' or 'roll' the coiled spring electrode. Rather the novelty of the Stearns invention is that the spring electrode is caused to roll along the member to be tested, while maintaining electrical contact with the high voltage test circuit. Here Claim 1 did not call for wheels or rollers while other claims did. Other claims should not be read into Claim 1. *Cameron Iron Works v. Stekoll*, 5 Cir., 1957, 242 F.2d 17. *Kennedy v. Trimble Nurseryland Furniture*, 2 Cir., 99 F.2d 786, 788. Figure 15, relied on by the District Court, did not state that wheels 68 and 69 had to be used. We read the specification as showing the preferred embodiment of the invention and that *if* wheels 68 and 69 are used, then they must be free to rotate. The patent also stated that the descriptions and accompanying drawings were 'certain embodiments of this invention,' which were by way of illustration and example." (pp. 596, 597)

Joints, Inc. v. Garrett (D.C.S.D. Cal. C.D. 1952)
102 F.Supp. 760 at P. 761.

"Each of these elements may be old. But they do not, either in the prior art cited, or other devices introduced at the trial, exist in the cooperative relationship in which they are used in this patent in order to achieve a distance result,—namely, a new method of coupling sewer pipes to avoid the inconvenience of the

more rigid couplings used before. The claims are simple and are purely descriptive. There is no need to resort to the specifications to limit the scope of the invention. See, *Schnitzer v. California Corrugated Culvert Co.*, 1944, 9 Cir., 140 F.2d 275. Nor do we find any elements of estoppel in the file wrapper. And if it be true, as contended by the defendant, that after rejecting the original claims, the claims actually allowed were as comprehensive, the fact does not speak against the validity of the claims allowed. Even assuming the identity of the claims allowed and those originally asked and disallowed, the fact does not spell invalidity. It may merely indicate either that the final form was more acceptable to the Patent Office, because it overcame the objection based upon the references cited.

* * * * *

“Or, it may well be that, being human, the Patent Office changed its views before final rejection.” (p. 761)

LIST OF APPELLANTS' EXHIBITS

NAME	Trial Exhibit	Woody Dep. Ex.	Identified Record Page	In Eviden Record Pa
Moon Patent 2,671,537	1		109	109
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Assignment Moon and Wagner to Philip Subkow	4		111	112
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Confirmation of right to recover for past infringements to Subkow by Moon and Wagner	6		112	112
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